ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 53.

BENJAMIN H. CHEEVER, APPELLANT,

vs.

JESSE B. WILSON AND ANNIE J. WORCESTER.

FILED DECEMBER 28, 1869.

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1 *Deposition of Thos. J. Fisher.*

Deposition of Thomas J. Fisher, on oath before the auditor:

I know the property mentioned in the questions, and I think twelve hundred dollars a year would be a fair rent from 1855 to 1860; twelve thousand dollars I should deem a fair value for the property at that time. I think there a three-story front building, and a one-story back building, extending to the alley. The buildings were destroyed by fire in 1861. From the time they were rebuilt (which I suppose was about a year after the fire) to the present time, I should consider eighteen hundred dollars a year a fair rent.

22 JAN. '64. THOMAS J. FISHER.

Deposition of Wm. L. Wall.

William L. Wall, being sworn, saith that he considers twelve hundred dollars a year a fair rent for the premises indicated from 1855 to 1860, and two thousand dollars from the time the buildings were re-erected to the present time. The present store-rooms were erected, he thinks, about sixteen months ago. He thinks the value of the property in 1855–1860 was $1200. The buildings were a store and dwelling-
2 house three stories high, with a back building, the depth of the lot, of two stories. He is an auctioneer, and is professionally acquainted with the value of real estate in Washington.

1st FEB, 1864. W. L. WALL.

Thomas J. Fisher further deposed that the value of the vacant lot, after the destruction of the buildings by fire in 1862, was from that time to this, to rent, a thousand dollars a year for a period of eight years, the tenant or lessee to erect buildings thereon for business purposes to the present, and to leave them at the termination of the lease; that in 1860 this lot would not have been worth more than $500 for the rent, and in 1861 he doubted whether it could have been rented at all.

13 FEB'Y, 1865. W. REDIN.

Deposition of C. Munck.

Christian Munck, being duly sworn as a witness in the above cause, deposed as follows: I occupied the upper story of a house or building No. 496, on 6th street, Washington, beginning in 1857. I was subtenant to Mr. Reese. I believe he hired of Mr. Wilson, and that he
3 had a lease from Mrs. Hughes or Mrs. Worcester. He was to pay first $300 a year. That was 1857. After the first year he was to pay $350, and had an allowance of $50 for repairs for the first year, which made the rent $350 for the first year. I think it was in 1859 that I took the property. Reese held it, till I think, at that rent, till 1859. I paid $350 a year. I have occupied it up to this time. I pay more now. When the war commenced, the rent was reduced to $300 for about one year. I do not recollect what was paid afterwards that. I pay $45 dollars a month now, and have for some five or six months past. From the beginning I paid the rent to Mr. Wilson. I paid one month to Mrs. Worcester hereof, two to Mrs. Campbell, her agent, and one month to Mr. , also Mrs. Worcester's agent. Since this, up to the present time, I have again paid to Mr. Wilson at the rate of 45$ a month. The owners did not make any repairs at all since have had the property. The tenant pays the water rent. All the repairs have been made by the tenant.

There has been no deduction from rent for repairs. I find my rent was raised last October from $25 to $45 a month.

C. C. MUNCK.

Sworn to before me this 21st day of June, 1864.

W. REDIN, *Aud.*

4 *Deposition of Jos. C. G. Kennedy.*

Jos. C. G. Kennedy:

In the latter part of Sept., or early in October, 1857, as the agt. of B. H. Cheever, I called upon Jesse B. Wilson, grocer, on Penn. avenue, and informed him of a divorce having been granted by some court in Indiana, divorcing said Cheever from the bonds of matrimony. I notified said Wilson that he would be held personally responsible for further rents paid on a to Annie J., late wife of Cheever. He stated that he had made large advances on rents yet to become due.

I showed him a copy of the decrees above referred to, being a paper duly authenticated as such, and having all the evidences of being an official copy thereof, which he examined, and of the character whereof he was made perfectly aware.

JOS. C. G. KENNEDY.

Sworn to by J. C. G. Kennedy, the 21 June, 1864, before me.

W. REDIN, *Aud'r.*

5 *Depositions of Jesse B. Wilson.*

Deposition of Jesse B. Wilson:

Jesse B. Wilson, one of the defendants, offered as a witness for the defendants by Walter S. Cox, esq., said defendant's counsel—Mr. Dinsmore, counsel for complainant, objecting to his competency—being by the auditor sworn, says, on examination by Mr. Cox:

1. First question. Look at the accounts marked W 1 and W 2, attached to Mrs. Worcester's deposition, and state whether they correctly exhibit the indebtedness of Mrs. Worcester to you.

(The introduction of Mrs. Worcester's deposition objected to by Mr. Dinsmore. The accounts objected to by him because they are not the original, but transcripts of Mr. Wilson's books.)

Answer. The accounts are correct.

2. Second question. State what these charges are taken from.

6 Answer. They are all taken from my books, except the statement of the promissory notes. Some of those notes were, I presume, upon my books, and some not. When I sent a draft I entered it on my books; but when a draft was drawn on me, I accepted it, and kept it as a voucher without entering it on my books.

3. Third question. State what has become of your books.

Answer. My ledgers I have here with me—my ledgers for, I think, the whole period. Some of the books containing the original charges were destroyed. Some we have. I think we have the day-books, which are made up every evening from the counter books or blotters. We at first thought they were destroyed, but on looking for other books some of them were found. The blotters were mostly destroyed.

3. Third question. State on whose credit the money and merchandize charged by you were furnished.

7 Answer. It was on Mrs. Cheever's, Mrs. Hughes, and Mrs. Worcester. It was first Mrs. Cheever, and on her divorce she assumed her maiden name, A. J. Hughes, and then she married Mr. Worcester. The charges were all against one person, under the three names.

4. Fourth question. Was there any agreement as to the liability of her seperate estate for this indebtedness?

(Objected to by Mr. Dinsmore, on the ground that an estate cannot be charged by an understanding, but must be in writing.)

Answer. These advances were made distinctly and positively upon her property alone. I looked upon it as her property. It was her agreement, also, that her property was to be liable for them. I knew that the property was her seperate property, and that Mr. Cheever had nothing to do with it. The account was kept seperately against her.

(Answer, so far as alludes to any agreement, objected to.)

5. Fifth question. At the time of your renewal of your lease in
8 1857, had you any agreement with Mrs. Worcester as to future advances; and if any, what?

Answer. Yes, sir. I saw her here in Washington; or, she saw me, rather. She wanted to make arrangements for some money; and she made the first application to me, and stated that if I could not accommodate her, she could make a lease of the property which I held, and sell it in New York, in Wall street. I then took counsel, and made arrangements to accommodate her, preferring to hold the lease myself rather than some one else should hold it over me. There was an agreement made for advances. The agreement was not in writing. The lease was made upon the agreement; and that was, that I should furnish her money in advance upon the basis of that lease, and that my advances should be repaid out of the rents as they accrued.

6. Sixth question. State whether any advances made by you subsequently to that lease were made in pursuance of that agreement.

9 Answer. Yes, sir.

7. Seventh question. Look at exhibit marked W 3, annexed to Mrs. Worcester's deposition, and state whether the entries to that paper—J. C. Barret is living or dead.

Answer. He is dead. The paper is in her, Mrs. Worcester's, handwriting, and was signed by her, and by her given to me.

8. Eighth question. Look at Exhibit W, No. 4, annexed to the same deposition, and state whose are the signatures, and by whom it was given to you.

Answer. This was given to me by Mrs. Worcester in person. The signatures are those of Annie J. Worcester and Louis Worcester—Mrs. Worcester and her then husband.

9. Ninth question. State on what account that paper was given.

Answer. It was given to cover advances made by me to Mrs. Worcester. I thought I ought to have some other security than the mere lease,
and the two assignments were made to cover all the advances
10 which I had made or were to make. These do not cover all the advances I made her.

10. Tenth question. State whether you have the notes charged in your statement W, No. 2, before referred to.

Answer. I did have them; but in settlement in October, 1863, with Mrs. Worcester, I surrendered them to Mrs. Worcester in a general settlement. I made a general settlement with her at that time. The notes referred to in answer to the second question were notes given by her. She would get several things of me and then give me a note in settlement, but these notes were not charged in the items on the books. The list of notes was made from the notes themselves.

11. Eleventh question. State when your store was burned.

Answer. The seventh of April, 1862, in the morning. It was wholly burnt. I rebuilt it. I never was refunded the cost of rebuilding it. I never have been.

12. Twelfth question. When you were informed of the decree of
11 divorce by Mrs. Cheever, did she make any representations as to the protection of your claims against her?

(Objected to by Mr. Dinsmore.)

Answer. She did, and said I was fully protected.

13. Thirteenth. What negotiations took place between you and Mrs. Hughes, or Mrs. Cheever, in reference to the rebuilding of the store and dwelling?

Answer. Immediately after the fire I called on Mrs. Hughes, in whose name the insurance was made, to know when they meant to rebuild, supposing they were going to rebuild immediately. She replied, positively, no; that she was not going to rebuild; that her friends had advised her not to rebuild; that she intended to keep the money to live on. I went to see her several times to get her to rebuild. I importuned her to rebuild. Finding that she would not rebuild—positively refused to do so—I then consulted Mr. Carlisle as my counsel, who wrote
12 a notice for me to serve on Mrs. Hughes, which was served. I have a copy. The notice was, if she did not rebuild by a certain time, I should rebuild. I annex the copy. After the expiration of the time I rebuilt the store. The lease was $1,000 a year for store, and $300 for house. I have been in possession of the property all the time. Some four or five months it was not used, no house being there. Some short time after the rebuilding the store I was offered by Mrs. Hughes to reimburse me to the extent of $3,000, provided I would recognize the lease and pay the rents as if no fire had occurred. This offer was in writing, and I think I have it, and I will annex it if I can find it.

14. Fourteenth question. What was the cost of rebuilding?

Answer. Between four and five thousand dollars, as near as I can recollect.

15. Fifteenth question. Are the books presented your regular
13 books, and all your books showing your accounts between yourself and Mrs. Cheever, Hughes, or Worcester?

Answer. They are, except the blotters, which were destroyed by fire when the house was burned. Mr. Barret, who kept the books during part of the time embracing the account, is dead.

(The production of the clerk who kept the books since is waived for the present.)

Cross-examination by Mr. Dinsmore:

1 x. Did you know anything of the purpose for which Mrs. Cheever went to Indiana in 1857?

Answer. I understood she went there to get a separation from her husband, but I don't think I knew when she first went what she had gone for.

2 x. Did you learn that she had been divorced, and when?

Answer. I did. I do not know the exact time when I heard it. I heard it soon after it occurred.

14 3 x. Were you not notified in writing soon after the decree of its terms in regard to the property in your possession and care?

Answer. I was not notified any further than that a copy of the decree was sent to me, and I suppose it was sent to me by Mrs. Worcester; I

think it was. I think it would be safe in saying the copy came from her.

4 x. Did not the plaintiff or his agent immediately call upon you and demand that the portion of the rents awarded to him by that decree should be paid over to him as they accrued?

Answer. No, sir. As to the demand, Mr. Kennedy called on me with a paper showing that he was the agent of Mr. Cheever. Whether he said he was agent or attorney of Mr. Cheever I am not able to say. He represented Mr. Cheever; I think he called as Mr. Cheever's agent, to collect money—to notify me—not to collect money; that he was ap-
15 pointed agent by Mr. Cheever to collect money of me after Mrs. Cheever's indebtedness to me was satisfied. I think that was what was said. He was there but a short time. I have never seen him since on that business. He has never been to see me since on that business. No order was served on me by any one, or from any source, to pay over money, except the representation of Mr. Kennedy at that particular time. I had the copy of the decree.

5 x. What did Mr. Kennedy come there for?

Answer. For, I suppose, the very purpose I have just answered. He came there to notify me that he was agent for Mr. Cheever to collect money after Mrs. Cheever's indebtedness to me was paid.

6 x. Did he qualify his demand by that restriction, "after Mrs. Cheever's indebtedness was paid?"

Answer. I think those were the very words he used.

7 x. Did not Mr. Kennedy, as Mr. Cheever's agent, demand of you the portion of the rents due to Mr. Cheever under that decree as they should accrue, without any qualification?

16 Answer. No, sir; no further than I have stated.

8 x. Did you know that those properties described in the plaintiff's bill were included in the marriage settlement of Mr. and Mrs. Cheever?

Answer. I do know it, but I believe it to be a fact. I did not know it in any transaction I was making.

9 x. Of what other estate described in the plaintiff's bill did you receive the rents, and how much have you received as such rents since you were notified of the decree of divorce?

Answer. I do not know what is stated in the bill. The property of which I received the rents were the property I was occupying and the Sixth street property. I received from the Sixth street property $1,560^{62}$, as stated.

10 x. What was the annual rent of that Sixth street property?

Answer. I can't tell the exact rent. It was $300 at one time,
17 $350 at an other, and I think I raised it above that. There are two houses; one was as I have stated. The other was at $200 at one time, $225 at another, and perhaps $250 a while. It may have been $300 at one time, and for a part of the time no rent was received. The account, as rendered Mrs. Worcester and filed, will show all the amounts I received in detail, marked W. R., 1.

Adjourned until Monday, January 6, 1865.

11 x. What the Sixth street property consist of which belonged to Mrs. Cheever and was in your care, you receiving the rents?

Answer. They consisted of two old and dilapidated buildings on 6th street, said to be the property of Mrs. Hughes and Mrs. Cheever. They were rented under leases, terms, and conditions stated therein; not in my care, except so far as to receive the rents.

12 x. If you say there were two houses, state the tenants of each from Oct., 1857, to the present time, the rates of annual rent during
18 that interval, the sums paid to you as rent, and the gross amount of rent you have received from both houses.

Answer. From Oct., 1857, to Feb'y, 1859, the rent of the first house on 6th street, occupied by Reese, at $300 per annum. From Feb'y 1st, 1859, the same house was rented to Munch, at an annual rent of $350, up to Oct. 1st, 1861; then from Oct. 1st, 1861, to Sept. 1st, 1863, to the same tenant, at $300 per annum; then to the same tenant from Sept. 1, 1863, to Oct. 1, '63, at $540 per annum. The second house was rented to Jacob Wilson from Oct., 1857, to Dec. 1st, 1861, at $300 per annum. During that time there were several months which were considered blank months as to rents, owing to the utter prostration of business in 1861; from Dec. 1st, 1861, to Sept. 1st, 1863, at $200 per annum. After that time the receiving of the rents passed to other hands. It is proper to add, in this connection, that I passed to
19 Mrs. Cheever, in our settlement in Oct., 1863, two notes given by Jacob Wilson for back rents; the amount I cannot now remember, but think it was, say $300, or perhaps more. The gross amount received by me from both houses, for Mrs. Cheever, or Worcester, ⅔ interest from the rents of the houses referred to, was $2,040 13.

13 x. State for what months either and each tenant has failed to pay rent, and whether at the time there was any property on the premises of such defaulting tenant subject to distraint.

Answer. From Jan'y 1st, 1859, to Nov. 1st, 1861, Jacob Wilson's rents seem to have stood in an unsettled condition. Notwithstanding he paid at intervals some money on account of back rents, say $192 68, of which Mrs. Cheever or Worcester received her ⅔ interest, say $106 67. From Nov. 1, 1861, to March 1st, 1862, he paid his rent. From March 1st, 1862, to July 1st, 1862, there seems to be two months for which no rents were paid. From July 1st, 1862, to Sept. 1st, 1863, his rents were paid, since which time I have had nothing to do with the prop-
20 erty in question. There may have been property subject to distraint. Of the fact I am not now positive. During the time of the unsettled condition of the rent referred to, Mrs. S. T. Hughes, who had ⅓ interest in the rents, was here in Washington, and was fully aware of the unsettled condition of the rents referred to. The subject of distraint was spoken of between us several times, and when I would say to her I would attempt to make the rent, she concurring, would say we had better let it stand for the present.

14 x. State what sums you have in such interval (see quest. 12, cross-ex.) expended on said Sixth street houses for repairs or otherwise, the items and the aggregate of the same, and produce the vouchers for such expenditures.

Answer. Nov. 25th, 1857, paid to corporation of Washington, on the 6th street property, for paving, $21 50, ⅔ of which was charged to Mrs. Cheever, $14^{33}, which seems to be all the money I expended on
21 the property in question on account of Mrs. Cheever, the voucher of the same having been returned to Mrs. Worcester, I think, as I cannot find it among any of my papers, or it may have been handed to Mrs. S. T. Hughes. I think there were charges on the 6th street property by the corporation for a sewer; who they were paid by, or that they were paid at all, I do not now know.

15 x. State whether the several renewals of the lease to which you have referred were or not a valuable consideration for which you could have paid money if they were not otherwise attainable.

Answer. The idea embraced in question 15, as I comprehend it, as to whether I would have paid money for the several renewals of the leases, "if not otherwise attainable," over and above what the leases themselves contemplated, and as in them stipulated, has never entered my mind until suggested by your question 15.

16 x. Of the moneys you speak of as having been paid to Mrs.
22 Cheever, in virtue of various assignments of anticipated rents, state what amounts were paid to her from the date of the first assignment of such rents to you. State what amounts you have paid to her since said notice and demand up to the present time; state the items and dates, and also state the aggregate amount in your answer to each branch of this question; and produce the vouchers of the payments, and where such vouchers consist of entries on your books, state the volume and page in each instance; please make seperate statements of the amounts before and after the demand and notice referred to.

Answer. The amount paid to Mrs. Cheever, from the date of the first assignment up to the time Mr. Kennedy says he made the demand upon me, was $4,710 98. The date of the first assignment was Feb'y 11th, 1857. The amount paid to Mrs. Cheever, since the demand which Mr. Kennedy says he made upon me, up to Oct. 1st, 1863, was
23 $2,399 04, at which time I had a settlement with Mrs. Worcester. Herewith is statement of items, dates, and also the aggregate amount, $7,110 02. The vouchers which I had were surrendered to Mrs. Worcester at our settlement, Oct. 22nd, 1863, in the presence of witness John C. Williams. In statement referred to in answer, you will find volume and page for items, &c. Amount before the demand said to have been made, $4,710 98; amount after the demand said to have been made, $2,399 04.

17 x. Have you underlet any portion of the premises on Pennsylvania avenue? If so, what portion, and when, at what rent, and what amount have you received as such rent?

(Objected to by Mr. Cox.)

Answer. No portion of the premises on Penn'a avenue was underlet by me during my occupancy of the same up to the 7th of April, 1862, at which time the building thereon was consumed by fire. From June 15th, 1863, to Sept'r 15, 1863, the first floor over my store was rented at $50 per month; from Sept. 15th, 1863, to Feb'y 1st, 1865, at
24 $75 per month. The amount received as rents, $1,387 50. The revenue income tax paid out of the same.

18 x. In statement marked 4, referred to on your 16th answer, please restate in reference to the notes therein mentioned, whose notes they were, where they now are, and, if in your possession, produce them.

Answer. They were notes given by Mrs. Cheever, or Worcester. They were surrendered to her at our settlement referred to in the presence of a witness. They amounted to $3,412 60, interest not added in the amount. Interest not extended. Mrs. Cheever, or Worcester, was the maker of these notes.

19 x. What were these notes given for? State the whole transaction that occurred at the time of the making the notes.

Answer. They were given for moneys advanced by me previous to that time, and I presume after the making the notes. I presume that is an answer.

25 20 x. Please state in detail, with the amounts and dates, the moneys so advanced by you at the time, previous to and after the making the notes as indicated in your last answer—such as were

advanced before, such as were paid at the time, and such as were paid after, seperately.

Answer. It is impossible for me to state what proportional amounts were advanced before, previous to, or after the making of the notes. I have no memoranda to show me. I do not know that there is anything on my books to show it. If there was I could hardly now explain it. As I have heretofore tried to explain, when she would come to borrow money, I would take the amount out of my drawer, as I would for any one who wished to borrow money, and take her note or due-bill, and that would be the end of it. I made no entry of it on my books.

21 x. Referring to said statement Z, please state whether any portion of the charges made previous to July 28, 1857, were included in
26 the note of that date as set down in said statement. Please state the amount of such charges, and if they were not included, why not, on your explanation as given in your last answer.

Answer. No note, entry, or charge made in statement Z, or any note held previous, was embodied in the notes here charged, which makes the basis of the question. The amount seems to be $1,136 04. I am sure I cannot say now why they were not included in the note.

22 x. Were those notes charged to her the notes referred to on your books or any memorandum of them made on your books?

Answer. The notes are charged, but it seems to me she is credited with some part of them somewhere on my books; but for what portion she is credited or where on my books, I cannot say. I have no memorandum, and I can only find out from a full examination of my books. It seems to me that when she gave me the note, I credited her with some part.

27 23 x. Please refer to your books and make statement of any such credit.

(Ledger B, page 494.)

Answer. I have examined, and there is no such credit.

24 x. Please state what Mrs. Cheever owed you on the 7th day of February, 1857, as appears from your books.

Answer. The balance against her on my books is $174 19, open account, over and above the notes not included.

25 x. Please state what amount you paid her from that time up to the time of the divorce as noted on your books.

Answer. I have already answered that I have no vouchers to show when amounts and what were paid at any one time. The amount of note, dated 27 July, 1857, was of course paid, or a large part of it was, before the time of the divorce, or my knowledge of the divorce. A large proportion, and perhaps all of it, was paid her. She got the whole amount of the notes, but when she got the whole of it I cannot say. I should presume that at the time of the date of the second
28 note, August 1, 1857, the amount of the first note of July, 1857, had all been advanced. Sometimes, when I took notes of Mrs. Cheever, or Worcester, and I had not cash enough to pay all she wanted, I have authorized her to draw drafts on me at sight, or three or ten days after sight, for the balance, as the case might be; that is to say, draw from time to time. It may have been so in reference to the note of July, 1857, but I cannot say it was so in this case. The money for that note of 28 July, 1857, may have been paid to her before the note was given, or may not have all been paid until after its date. The drafts on me for the amounts of any notes were, when paid by me, pinned to the notes to which they referred, and when a settlement was made by me with Mrs. Cheever, or Worcester, the note and drafts were returned by me to Mrs. Cheever, or Worcester.

26 x. Of payments made subsequent to the dates of such notes, how were they made? And if you accepted a draft or paid her money,
29 or delivered her merchandize, did you enter such upon your books, and should or should not the same go in payment, as far as they might, of such notes?

Answer. They may have been made by person or by draft. The money was paid her by me in person. The money paid her on drafts accepted would not be entered on my books. If they were you would find a corresponding credit. Such credits upon my books will go in payment of such notes to the extent of charge and credit—debit and credit.

27 x. Please refer to your books subsequent to the date of such notes in statements Z and Y, and state cash paid draft July 9, 1859, went into any note, or had any thing to do with any note.

Answer. No, sir; it had nothing to do with any note.

28 x. Refer to statement Z aforesaid, and state upon whom were drawn the New York drafts therein mentioned, who was the drawer, whether you have said draft; and if so, produce them.

30 Answer. They were drawn by me—that is, they were bank drafts on New York banks in my favor, and endorsed by me to the order of Mrs. Cheever, or Mrs. Worcester. I had some money in New York as well as here, and I cannot say positively whether all these drafts were bank drafts, or drafts by myself on New York houses. I have not said drafts. If drawn by me on New York house, they were on John Scymson & Co.

29 x. Did you at any time effect or have any insurance on the 6th street property or your own house?

Answer. I had no insurance on the 6th street property at any time for my benefit—none whatever. There was an insurance on the 6th street property for Mrs. Hughes in her name. I effected no insurance on the avenue property, and had none up to the time of its destruction by fire. There was an insurance on the avenue property,
31 which I occupied, for $4,000, in the name of Mrs. S. T. Hughes. After I rebuilt the store-house on the avenue, I did effect an insurance on it in my own name in my behalf.

30 x. Please look at statement Y referred to in your answer to 16th x. question, and state to what insurance the moneys charge there as paid for premiums were meant to apply.

Answer. They meant to apply to the 6th street property and to the avenue property insured in Mrs. Hughes' name.

31 x. Look at statement Z referred to in same answer, and state who was L. Worcester referred to in the fourth item.

Answer. It was Louis Worcester.

Direct examination resumed:

16. Have the rents accrued from you to Mrs. Worcester to the time of the fire, and collected by you, reimbursed your advances made before you had notice of the divorce, and interest on such advances?
32 Answer. No, sir.

17. Can you state on what amount she was indebted to you at the time of the fire?

Answer. Over four thousand dollars over and above the rents accruing from me, and collected by me and credited to her.

18. What amount had you advanced to her before the date of the first assignment of rents by her before referred to in the testimony?

Answer. Between one thousand and fifteen hundred dollars.

19. When the whole amount of any notes given by her, before referred to, was not advanced at the date of the note, within what time afterwards was the ballance advanced.

(Objected to by Mr. Dinsmore.)

Answer. Within a short time, I should say from five to twenty days, as my memory now serves me.

20. What was the cost of rebuilding the store after the fire?

33 Answer. Four thousand thirty-five $\frac{29}{100}$ dollars, as shown in this bill of Charles Edmonston, which tells the whole story. A copy is annexed, marked W.

21. Was any further cost incurred; and, if so, how much in adapting the second story to occupation of a tenant?

Answer. Additional cost was incurred for such for $450.

22. State why you made advances to Mrs. Worcester, on the credit of her rents, after you were notified of the divorce?

Answer. After I was notified of her divorce, I conferred with my counsel, James M. Carlisle, esq., and he said that the property here could not be effected by any proceedings of any court that had not jurisdiction here, any court in Indiana, or something to that effect; that I being a lessee, the property I hold could not be effected by any decree of court in Indiana. Mr. Carlisle knew I knew that the parties had been divorced.

J. B. WILSON.

34 Jesse B. Wilson recalled by complainant:

X. Please state the amount of your annual profits in that store on Pennsylvania avenue, and the capital employed in your business there.

(Objected to by Mr. Cox. The auditor overrules the question.)

X. Please state whether you have or not done a very profitable business.

Answer. I have done a very fair business.

J. B. WILSON.

Question by the auditor to Jesse B. Wilson:

Explain the charges in your account for premiums on life policies of insurance.

Answer. The life policies are policies on Mrs. Worcester's life. I have the policies with me, and also on Mr. Worcester's life. It was under
35 the original understanding, that she should insure her life. These are the policies after the rebellion broke out. Mr. Lewis came down for me to renew the premium. I asked what would be the result if Mrs. Worcester died down south. He gave me no encouragement, and I declined to renew it. He said he did not know whether, under these circumstances, the insurance would be paid. The insurances by her of her life was part of the original understanding by which she was to receive advances. The policies are filed. The premium on Mr. Worcester's policy is also charged in my bill. It was her work that this also should be done.

Question by Mr. Cox:

What dealings have you had with Mr. Monch, as tenant of Mrs. Cheever, since October, 1863?

Answer. I have had no dealings at all as agent of Mr. Cheever, or Worcester. Mrs. Worcester borrowed of me, on the 11th of
36 March, 1864, three hundred dollars, for the payment of which

she gave me an order on Mr. Monch for so many months' rent (5 months' rent) for two hundred dollars, and one on Jacob Wilson for one hundred dollars. Jacob Wilson has his order. Here is Mrs. Worcester's due-bill for $300, and the order on Monch. I was not then her agent. Mrs. Campbell was then Mrs. Worcester's agent. On the back of Mrs. Worcester's due-bill is a statement of all the payments by Munch and Wilson. The $25 over-payment went towards a store bill I had against her.

J. B. WILSON.

MONDAY.

Jesse B. Wilson recalled by Mr. Cox:

1st. In your interview with Mr. Kennedy did you state or intimate to him that Mrs. Worcester's actual indebtedness to you, at that time, was $2,000, or less than that amount; and did you mention any amount?

37 (Objected to be by Mr. Dinsmore.)

Answer. I positively assert that no amount was mentioned by me, or intimated by me. If any amount had been intimated, it would not have been two thousand dollars, but must have been in the neighborhood of six thousand dollars; and I further state that no mention was made by me of any assignments other than the leases. I utterly deny that conversation detailed by Mr. Kennedy, as to an advance of two thousand dollars by me to Mrs. Worcester, or as to any assignment by her to me, ever took place. No such conversation as that between Mr. Kennedy and myself ever took place then, or at any other time.

J. B. WILSON.

38 MARCH 6*th*, 1865.

Mr. Wilson admits that the tenants of the 6th street property paid their rent to him from April, 1863, to Oct., 1863, the time of his settlement with Mrs. Worcester, & stated that Munch's rent was raised to $45 per month, & that he had rec'd one month (perhaps Oct'r) from him at the new rate of rent. Further, he admitted that he was chargeable with the whole of Jacob Wilson's and Reece's rents for the whole period they respectively occupied the premises, at the different rates of rent; but from the gross amount was to be deducted, 1, Mrs. Hughes', 3d for dower; 2d, the 5 or 6 months not charged to Jacob Wilson at the commencement of the war, Ap'l, 1861; 3d, the notes handed to Mrs. Worcester at the settlement in Oct., '63, of Jacob Wilson for $290 & 65$\frac{85}{}$; & 4, the sums he has charged himself with in his account; that if there be any deficiency he is answerable for it, in addition to the sums he has returned as paid to him; that this accounting to extend, as to Reece, from 1857 to 1859, as to Munch, who succeeded him, from 1859 to Oct., 1863; and as to Jacob Wilson, from 1857 to Oct., 1863.

W. REDIN.

39 *Deposition of Jno. C. Williams.*

John C. Williams:

1. Did you know J. C. Barrett? If yea, is he living or dead?
Answer. I did know him. He is dead.
2. Did you know his handwriting?
Answer. Yes.

3. Look at the paper marked W 3, filed with Mrs. Worcester's deposition, and state the signature of the attesting witness is that of said Barret or not.

Answer. It is.

4. Look at the list of promissory notes in paper W 2, annexed to said deposition, and state by whom the same was prepared, and from what the same was prepared, and in whose handwriting it is.

Answer. It was prepared by me from the notes themselves; it is my own handwriting.

5. Were you present at a settlement between Mrs. Wilson and Mrs. Worcester, in October, 1863?

Answer. I was.

6. State what became of the notes mentioned in said list.

Answer. They were surrendered to Mrs. Worcester.

7. State what you know of Mr. Wilson's mode of dealing with Mrs. Cheever when he advanced money to her.

Answer. I do not know.

40 8. How long have you been in Mr. Wilson's store?

Answer. Since February, 1858.

Cross:

1. How long have you been the book-keeper of Mr. Wilson?

Answer. Since 1858. Mr. Barret kept the books part of the time, and I part of the time; that is to say, since I first went in.

2. If cash had been paid out of the store to one person in the interval of two years, beginning at the time you kept the books, should you or not have known it; I mean to say cash of which there appears to be no entry on the books, if such cash amounted in the aggregate to two thousand dollars, or thereabouts?

Answer. No, sir; I would not have known it; I did not know it; I did not know of such an amount being paid.

3. From the last part of the year 1853 to say the middle of 1860, did you know of moneys being paid out of the store to any individual in any considerable amounts? If so, to whom and in what amounts? I mean moneys not entered on the books.

Answer. I was not with Mr. Wilson in 1860. I left him in
41 1859—October, 1859. Only for goods purchased by Mr. Wilson. I do not know of any other.

4 x. Do you know of any money being paid to Mrs. Cheever, or Mrs. Worcester, which was not entered on the books?

Answer. I do not know of any money being paid to Mrs. Cheever.

5. Who kept the books from the November, 1858, to the time you left; who kept the journal and day-book?

Answer. Mr. Barret kept it part of the time, and I part of the time. We had no journal. Mr. Barret kept the books most of the time. I kept it at intervals. I did keep the books at intervals from the time I first went there in February, 1858. They were kept principally by [by] Mr. Barret.

9. Do you or not remember Mrs. Cheevers visiting Mr. Wilson at the store while you was there?

Answer. Yes, sir.

10. Where were her interviews with him, held in the store or the counting-room?

Answer. In the counting-room.

11. Do you remember any one being called in as witness to transactions between them; and, if so, who?

Answer. He would always call Mr. Barret.

12. Who was the principal clerk or manager for Mr. Wilson?

Answer. Mr. Barret.

JOHN C. WILLIAMS.

42 *Deposition of Jacob Wilson.*

Jacob Wilson, a witness produced on the part of the complainant, being by the auditor, deposes and says:

First question. State whether you occupy one of the Hughes-Cheever houses mentioned in complainant's bill, on 6 street, in Washington City, D. C. If you, since when; to whom have you paid the rent since August, 1857; and at what rates or rate per month or per annum; and what months have you failed to pay; and at the time of such failure or failures was there sufficient distrainable property on the premises from which to make the rent?

Answer. I occupy one of the houses referred to. I have occupied it, I should judge, in the neighborhood of seven years, though I cannot say exactly. I should think it was about since the year 1858. I do not know whether it was in August, 1857 or 1858, I went into the house. I could not say positively. It was one of the years. I paid rent from the first of my going in the house until about three or four years ago, up to about four years ago. I paid to Jesse B. Wilson; about a year ago, I paid him $200 on an order from Mrs. Worcester. From the time I stopped paying Mr. Wilson, I paid the rent sometimes in Mrs. Worcester's receipt and sometimes to Mrs. Campbell, on 4½ street; I think No. 22 4½
43 street. I have paid some to young Queen. I think for about two years I had the property at $200 a year, and previous to and after that time at $300 a year. There was three or four months they did not charge me any rent. About the time of the breaking out of the rebellion I did not pay any rent for that four or five months. I should suppose there was sufficient property on the premises that could have been distrained to pay the rent. I should suppose that there was always sufficient distrainable property on the premises. I stopped paying rent to Mr. Wilson about the time of the breaking out of the rebellion. The rent for the two years at $200 a year was about the breaking out of the rebellion.

2. Second question. Please hand in what receipts for rent you have.

The witness is allowed till Friday morning to bring in the receipts called for.

FRIDAY, *February* 14.

Jacob Wilson:

I have produced all the receipts I found on a hasty search. The
44 oldest morandum I have is a due-bill from me dated Apr. 5, '61, payable to J. B. Wilson, agent, or order, for Mrs. S. T. Hughes and Mrs. A. J. Worcester, for $290, in settlement for rent. The next is dated Dec. 4th, 1863, signed by A. Queen for A. J. Worcester, $25, for month ending Nov. 30, 1863. The next is January 18, 1864, $25, for rent to Jan'y 1, signed Maria R. Campbell, for Mrs. Worcester. The next is an order dated March 11, 1864, from Mrs. Worcester, directing me to pay to Jesse B. Wilson 4 months' rent; the first to be paid on the first of April, 1864, and each succeeding month thereafter, with Mr. J. B. Wilson's receipt for said four months endorsed thereon. The next is dated Aug't 30, 1864, signed by said Mrs. Campbell, $50, for two months,

ending Aug. 31, 1864. The next is dated Nov. 28, signed by said Mrs. Campbell, for $50, in full up to Nov. 28, 1864. The next is dated Jan'y 12, 1865, signed by Mrs. Worcester, for $50, for two months ending Dec. 31, 1864. I state in of my answer to question, when I said that I paid Mr. J. B. Wilson $200, that I find on looking at some memorandum that I have that it was $100 instead of $200 that I paid.

State when you ceased paying the rents to Mr. J. B. Wilson.

Answer. I think it was about the time I got the lease renewed, which was about the 1st of September, 1863.

JACOB WILSON.

45 *Deposition of J. C. G. Kennedy.*

J. C. G. Kennedy, heretofore, on the 21st June, 1864, produced by the complainant and sworn by the auditor, being recalled by complainant, doth say:

1. The defendant Wilson states in his testimony that when you called upon him in behalf of Mr. Cheever to give notice of the divorce, &c., as you have before stated, that you demanded the rents that were coming when the mortgages or assignments were paid up. Please state in regard to this.

Answer. I knew nothing of the mortgages or assignments until he informed me. I was not aware of any until he informed me. He stated that he had made advances to Mrs. Cheever for some two thousand dollars—not less than eighteen hundred dollars and not exceeding two thousand dollars. I do not recollect whether he said to Mrs. Cheever or Mrs. Hughes. I was told of the assignments by him then. I felt surprised at the amount, but I was satisfied from the tenor of his conversa-
46 tion that the advances were not so great as in the assignment. I supposed that he had left sufficient margin to secure him from risk. The impression left on my mind was that the whole amount had not been paid, and that he had taken an obligation for two thousand dollars, and was then making advances on that, but had not then advanced that amount. My object was to put Mr. Wilson in a position of responsibility to Mr. Cheever, and to prevent him from making further advances to Mrs. Cheever. I asked him, when he said to me they are in arrears to me in some two thousand dollars already, if he had advanced that amount, he taking all the risks of fire, &c., &c., and from his answer I supposed he had not bona fide advanced that amount.

Cross-examined by Mr. Cox:

1 x. After being informed of the assignment and of his advances, did you state to him that you claimed the rents for Mr. Cheever, after he, Wilson, should be reimbursed his said advances?

47 Answer. No, sir. I considered that all the rent that accrued from that time attached to the real owners of the premises, and were not affected by the assignments previously made.

2 x. Do you mean to say in your direct examination that the defendant Wilson stated that he was to receive from the rents more than he had advanced and agreed to advance?

Answer. He made no such direct statement to me.

3 x. Can you state with certainty the amount then claimed by him to be due?

Answer. I have never thought of the amount until to-day, but the amount of two thousand dollars was in my mind.

4 x. Where did the conversation of which you have spoken take place, and how long did it last?

Answer. It took place in Mr. Wilson's store, on Pennsylvania avenue, in this city. It was near the desk, which I think was just behind the front door—near the front door. I know it was within ten feet of the front door. I think the store has since been rebuilt. I think there
48 was no back office. I never was in any back office there. The conversation lasted for ten or fifteen minutes. It may not have been more than five minutes. I know it was not long, not longer than the business required.

JOS. C. G. KENNEDY.

49 *Deposition of B. H. Cheever.*

Deposition of Benjamin H. Cheever:

1. State whether you received from Mrs. Hughes any part of the insurance on the building on Pennsylvania avenue drawn by her; and, if so, what amount and what application was made of the same.

Answer. Mrs. Hughes, having charge of the affair of this insurance, consulted me several times as to what course to pursue. I desired her to go and rebuild the building. There were various interviews at various times. I was very cautious in the matter. Finally she did not take my advice, as I understand. She sent for me, and asked me what she should do with $1,500 which she wanted to invest—what kind of investment she should put it in. I advised her government securities. She replied that she had no confidence in government securities; that they were going to smash up; that Washington property would
50 be worth nothing. That was her reply—that she had no confidence in government securities. I then suggested some New York securities; some New York City; something like that. I told her that there was very great uncertainty in everything—great risk in everything—outside of real estate. She then replied she wanted my best advice; that the investment would be for my children, if not now, very soon, remarking that she should not live long—die very soon; she was very desponding. She then referred to my making a great deal of money in investments in the horse rail between this city and Georgetown. I was then residing here on G street, in this city. I told her it was a speculation, but I believed one of the very best. She then asked me the price of this stock. I told her the prices were from $65 to $100 per share; that I had been selling various other property and investing in this, and was buying all I could get of this at less than $100—all
51 I could below par. I told her that Mr. Cooke, Jay Cooke & Co., principal holders here, and Mr. William A. Darling, 3d avenue road, New York, were getting control of the road. If they did, they had both said that the stock would be worth more than $100 per share—considerably more; that I was not so sanguine as they. After this she said, "Will you let me have some that will bring 6 per cent?" Five days after she sent me a check for $1,500, and I sent her fifteen hundred dollars at the nominal value of $100 a share. It had cost me up to $84 a share. That stock has never been received by me for the children. The will has never been settled. Mrs. Hughes died some two years ago. Whether this $1,500 she sent me was part of the insurance money I know not.

Cross-examined by Mr. Dinsmore:

1 x. Since the divorce have you provided for the support and edu-

52 cation of the children; and, if so, at what expense, having reference to the other expenses of your household?

Answer. I have supported all the children that have been in my possession entirely and wholly in the best possible manner at a very large expense—more than $3,000 a year. I think the expense would average at least two thousand dollars a year—more than that from the divorce. Since some months before the divorce they have been at boarding-school; my daughter all the time until the year or two past; my oldest son until two years past; the youngest son is now at military school in New Jersey. The school charges for the daughter was over $1,000 a year; the boys were each $600 a year. These are the general terms as near as I can get at it.

B. H. CHEEVER.

53 *Deposition of Annie J. Worcester.*

Deposition of Annie J. Worcester:

TUESDAY, *February* 14, 1865.

Annie J. Worcester:

1. Did you deal at the store of Jesse B. Wilson, and borrow money from him in the year 1856 and since?

Answer. Yes, sir; I did.

2. What was your mode of dealing when you borrowed money?

Answer. When Mr. Wilson first made this arrangement in regard to borrowing money, I told him for the next three or four years, and perhaps longer than that, I should require considerable money. He agreed to let me have it if I would secure him for it by giving him an order on all the rents, and increasing the lease so as to cover the whole amount of the money that I should have. There was no sum stipulated. I was to have all that I needed. I formed this arrangement with the
54 distinct understanding that I was to have this money if it took ten years to pay it. I do not mean that it was to be for ten years, but I was to have the money which was needed, and he was to have a lease sufficient to cover it if it took fifty years to do it. When I wanted money, say $1,000 for instance, I would go to Mr. Wilson and say I want a thousand dollars. If he had not the whole amount he would pay me what cash he had, and say, draw on me at sight, or at four or five days, as the case might be, for the balance, and I would give him my note for the amount I asked for. That would only occur at times. Sometimes I only wanted one hundred dollars or so at a time, and I would get from him what I asked for.

3. Was your indebtedness an open account and for money borrowed contracted upon the credit of your seperate estate?

Answer. Entirely so; upon the property which my father left me.

4. Can you state the amounts of the several notes given by you
55 to Mr. Wilson for borrowed money?

Answer. I don't know that I can give the exact amounts, there were so many of them. I think I can come near some of them. There were several notes of $100 given; one note of $200; and there was a note of $1,000 given; there was a note of two thousand four hundred and odd dollars given; I can't say exactly, but it was two thousand four hundred and something; I think was a note of $900 given; there was another note, I think, of $1,000 given. There were several other smaller notes, but I can't state them particularly. If I could see a statement I could see whether the list was correct. I recollect that once—I can't say

whether it occurred more than once however—there was a note as small as $50, I think; there was another note, I think, of two hundred and something, I have forgotten what, somewhere in 1861 or 1862. I never expected to be questioned about it. I think it was about 1860, but I can't remember dates; but am positive about the amounts I have mentioned.

56 5. Please look at the list of notes in Exhibit W, filed with your deposition, taken in New York, and state whether that refreshes your memory on the subject.

(Objected to by Mr. Dinsmore.)

Answer. Since I have seen the memorandum I recognize every single note.

6. Had or not you the original notes when you gave your deposition in New York?

Answer. I had the notes then. I am confident I did not destroy them before the middle of December last. I regret having done so at all. I may not have destroyed all.

7. State whether or not you actually received the whole amounts of the several notes before referred to from Mr. Wilson.

(Objected to by Mr. Dinsmore.)

Answer. Yes, sir, every dollar; sometimes in gold and sometimes in notes. I think it was generally paid in gold.

8. State, if you know, what became of the notes and drafts and other evidences of debt.

57 Answer. They were given to me when I returned from the South north a year ago last October. Mr. Wilson and I had a settlement of all of our affairs, and adding up all the amounts, and handing me, through his clerk—Mr. Williams I think his name was—all the notes he had of mine, the vouchers being pinned to each note. We made a memorandum of the whole, and then I gave him my note for the whole amount, I think, $3,290. I can't be positive about the amount, but I think it was three thousand two hundred and odd dollars. That covered all that was due on the back notes. He gave me all the back notes, with the vouchers pinned to them, and I kept them while I remained here, and took them with me when I returned north, and I kept them, and I may have some of them now, but I think I destroyed them all just before I came here last December. If I have any of them I will return them to you if I can find them, though it may be some time since, as I have no expectations of going immediately to Stanford, Conn. I think in destroying a number of papers, in trying to blot out the memory of past, I have destroyed them.

58 9. When you made your deposition in New York, did you verify the list of notes then exhibited to you by comparison with the originals in your possession?

Answer. I did not have the original notes in Mr. Breed's office. I spoke from memory, as I do now. I had the notes, and could have produced them, had I been asked to do it.

10. When the full amount of any note was not advanced to you by Mr. Wilson, at the date of the note, within what time after its date did you receive the balance?

Answer. Always within a few days; I think I might safely say within fifteen days, and within ten days.

11. Please look at the accounts marked W 1 and W 2, annexed to your deposition taken in New York, and state whether or not you had previously examined them, and whether or not they are correct.

Answer. I can't remember all these little items. At the time the bills

were rendered by Mr. Wilson, they were perfectly satisfactory, and were settled.

59 12. Please look at the papers marked W 3 and W 4, annexed to your deposition aforesaid, and state whether or not they were executed by you, and delivered to Mr. Wilson.

Answer. Yes, sir; they were.

13. When you renewed Mr. Wilson's lease, what were the inducements and considerations for such renewal?

Answer. To secure him for the money I owed him, or for the money he had agreed to let me have. As I stated before, it was agreed before I had received a dollar from him, that he was to be secured by the lease for the money I should get of him, whether one or ten thousand dollars. There was no sum specified.

14. Did you or not state to him anything about leasing to others, if he should not accept a renewal of the lease?

Answer. Certainly, sir; I did. I was obliged to do so. I stated to Mr. Wilson that I should lease the property to parties in New York, who were very anxious to get a lease of the property, if he did not take it.

15. Did you give Mr. Wilson notice of the decree of divorce, and what notice, if any, as to the protection of his claims against you?

60 Answer. I could not conceive of the divorce having any influence on Mr. Wilson's interest. I supposed I was dealing wholly and solely with my own, and was not to be questioned by any one. Supposing, of course, that the party from whom I was divorced would possess manliness enough, say nothing of self-respect, never to annoy me on the subject. I told Mr. Wilson that his interests under the lease were fully protected untill the whole of my indebtedness to him were fully paid.

16. Where and in what condition were you when the decree of divorce was passed?

Answer. I was in Indianapolis, very ill with bilious fever. I had not been able to leave my room for a number of days before the decree was granted.

17. Were you capable at the time of giving an intelligent consent to the terms of said decree?

Answer. I don't think I knew the terms of the decree. I did not know what the terms were. The terms were proposed to me some four days before the decree was made, and they presented a paper to me to sign, and I was advised to sign it; and I did it without knowing or feeling the importance of what I was doing. In that frenzied and excited state, I would have signed anything. I had no idea whatever that it

61 had anything to do with my father's property, or with the divorce itself.

Cross-examination:

1 x. What was the date of Mrs. Hughes'—your mother's—death?

Answer. 12th of April, 1863.

2 x. In your answer to second question, you spoke of an object you had to accomplish. What was that object?

Answer. My object was my own personal expenses, whatever they might be.

3 x. State whether the notes you gave Mr. Wilson were in the regular form, payable to him or his order, for value received, or were mere memorandas.

Answer. They were notes regular given, bearing interest from the day they were given; notes in regular form, ordinary form of promissory notes with interest.

4 x. In regard to the note for $2,412, state whether you received any money from Mr. Wilson on that day; and please examine W 1, annexed to your New York deposition, and state whether you received any sight draft on the day of the date of that note, July 28, 1857.

62 Answer. Of course, I did. I certainly I did receive a sight draft that day. I cannot say that I received a sight draft that very day, or all the money in the note; but I received all the money in the note in the time stipulated by Mr. Wilson. The draft for $500 is down on this paper, and I am certain it is correct as stated. I now recollect that I took a memorandum with me to Mr. Breed's office, which I had forgotten till this moment, and compared it with the papers exhibited to me, and found they coincided exactly. I may have that memorandum now. I am not positive whether I have or have not. I have it not with me in this city.

5 x. Of the papers annexed to your New York deposition, were you able to verify each item by that memorandum?

Answer. Not all those small items; not the items connected with the grocery items. At the time they were presented to me I found they were correct, and I settled them, not supposing I should ever hear of them again. I have the amount of those grocery bills; not the items, but the gross amount.

63 6 x. Who prepared or furnished that memorandum?

Answer. I prepared it with my own own hands, from the papers handed me by Mr. Wilson.

7 x. Please state if you received $3,500 in cash, or thereabouts, from Mr. Wilson, within twenty days of July 28, 1857.

Answer. I think I did. I can't say whether it was exactly $3,500; I think it was a little more than that. I am almost confident it was a little more than that.

8 x. Please state if it amounted to $4,000 or $4,500.

Answer. I could not say positively; the amounts are all in this statement—all the money I got from him. I gave him my note at the time. The largest amount I received from him at any time was about that time.

9 x. Did this sight draft on New York of July 28, 1857, for $500, make a part of the note of that date for $2,412?

Answer. I think so.

10 x. How long were you ill at Indianapolis? When did you recover? How long were you there before your illness?

64 Answer. I was ill there two or three weeks. I am not positive about the time; probably not less than ten days, and probably not more than four weeks. I recovered, I suppose, some time in September. I do not know how far in September. I was convalescent some time before I recovered. I can't say when I recovered. I think it likely I was feeble through the better part of September. I went into the State of Indianna in February, and was there all the time except the few weeks—two or three weeks—that I was here on account of the conduct of the opposite party. I was absent from the State about four weeks. I think it was in April or May that I came here; was here perhaps not more than ten days. I was detained in New York a few days, and then returned to Indianna, perhaps in May or June, and remained there untill my illness.

11 x. Have you any feelings of enmity or hatred towards the plaintiff in this cause?

(Objected to by Mr. Cox.)

Answer. I hardly think he would be worthy such a passion.

12 x. Have you stated lately, and if so, when and where, that
65 you regretted that you had not killed the plaintiff?

(Objected to by Mr. Cox.)

Answer. I believed that I would have done my whole duty to myself, my children, and my God, in taking his life, in consequence of the ten long years of persecution, his course to me and my children towards me. I have lately made this remark just as I have given it. The remark was called forth by a charge made against me by Mr. Chever. No persecutions of his for fifty years towards me in regard to my father's property would have called forth such an unwomanly remark from me; but it was called forth by charges made against me of another nature by Mr. Chever.

13 x. Have you stated that it was no use for the plaintiff to prosecute this suit inasmuch as you and Mr. Wilson had the sole interest in this property? Have you stated it in this city recently, or words to that effect?

(Objected to.)

Answer. No, sir; never thought of it. I do not fully under-
66 stand the question. I do not consider that Mr. Wilson has any interest in the property. He has only a claim on the property until the debt due by me to him is paid The property, I consider, is mine while I live, and my children's after I am dead. I have stated that it was useless for Mr. Chever to involve the property, as he has been doing by this continued litigation. I said I had justice on my side.

14 x. In regard to the payments of money which Mr. Wilson has made to you, as testified to, were they made in coin, bank-notes, or bank checks? If the last, on what bank or banks drawn? Have you always received these moneys personally in hand? Of these cash payments which were in coin, which in bank-notes, and which in checks, as near as you can remember?

Answer. I generally received the money from Mr. Wilson in gold. If he gave me a check I got it in gold, and if he drew a draft, or I drew a draft, I got it in gold. I was a stranger and I always got the gold. I do not know on what banks the checks were; I think when a
67 check was given me it was generally drawn on the Bank of Washington. When I had a draft I went into any of the banks and got it. I did not always go myself for it; I sometimes might have got a friend to go into the banks to get the money. When money or checks were paid by Mr. Wilson, I always received them personally in hand from Mr. Wilson. I may sometimes have given an order on Mr. Wilson for money. I may have done that three or four times, or may have done it much oftener. I can't say how much I have received in gold, checks, or drafts. I generally got it in gold. District money would not suit me, as I was moving about. Gold suited my convenience, and when I drew it out of the banks, I drew it out in gold,

15 x. Please state how the $2,400 of July 28, 1857, and the $1,000 August 1, 1857, were paid to you.

Answer. I cannot say positively that they were all paid, but I really I think they were paid in gold. I do not know that it was all paid me in gold; part of it may have been in sight drafts given by Mr. Wilson to me in person.

Direct res.:

68 18. You have said that you think the sight draft of $500 of July 28, 1857, was included in the $2,400 note of the same date. Has Mr. Wilson made an error in charging them both separately?

Answer. When I made that answer I thought so, and I cannot say positively whether it was so or not, but can say when I see the memorandum I made and had before me in Mr. Breed's office. I there acted upon a full recollection of the whole matter. When I settled with Mr. Wilson, as I have stated, in his store, in October, 1863, I fully understood the whole matter, and had all the vouchers before me, and which were handed me through Mr. Williams. If he had made a double charge I certainly would have discovered it at the time. If these papers are the same as shown me in Mr. Breed's office, they are undoubtedly correct.

19. When the store account was running, up to February, 1857, were you keeping house, and where?

Answer. I was keeping house in this Washington City, D. C.; no, I think I was living with my mother in this city. Yes, sir; I see items here which I remember why they were purchased and orders
69 that I gave.

20. Please produce such of the notes and drafts as you can find, and the memorandum used by you in New York, heretofore referred to.

Answer. If I have them I will send them. I am not going directly to Stamford, Connecticut, and I could not get them by sending for them. They are packed away there, and I am not able to go there unless my expenses are paid by the opposite party.

Re-cross:

16 x. At the time and since the alleged settlement between yourself and Mr. Wilson, of October, 1863, have you not received from him cash and notes of himself and third persons? If so, what and to what amount?

Answer. Yes, sir; since then I have called in Mr. Wilson's store and asked Mr. Wilson for a little, while he has loaned me sums say $50 at a time, and I have paid it in a few minutes. I have frequently gone in and asked him for a loan, and have returned it. I was not here when the fire took place; but when I came here in October, 1863, we had
70 the settlement. I think the amount in the first receipt was for money credited in the account of final receipt. I think I got the $50 mentioned in the second receipt in money, but I may be mistaken, and it may have been also put in the final account.

Re-direct:

You mean to state in your answer to 15th cross-question that you were here in person when you received the amount charged 28 July, and 1 Aug., 1857?

Answer. I do not say I was here in July and August, 1857. If I was not here I received the drafts or notes by letter from Mr. Wilson. I kept no account of dates and my movements. The decree of divorce was passed in August, 1857, I think. It seems to me that I made a second visit from Indianapolis here; I have a faint recollection of that.

Cross:

If you received at Indianapolis drafts, notes, &c., by letter, through whom did you negotiate them?

Answer. Through myself. Frequently sight drafts, I think drawn from Bank of Washington here on New York, were sent me. I remember one occasion when I went into a banking house and got $500
71 on a draft sent me, and the house closed that day. I do not think it was a regular bank, but a banking house. If it was possible that sight drafts on New York could be sent to and used in Indianapolis, it was done that way. I am almost positive it was done in that

way. I remember frequently getting money in that way. I am sure of more than six or eight times.

ANNIE J. WORCESTER.

72 *Deposition of Edward Simms.*

SATURDAY, *February* 18, 1865.

Edward Simms, produced by complainants, being sworn by the auditor, states as follows:

1. Please state the negotiations of which you are cognizant in regard to the rebuilding of the store now occupied by the defendant Wilson, after the fire in 1862.

Answer. Mr. Wilson came in company with Mr. Edmonston, the carpenter, and submitted a plan for rebuilding the house, which I think they said would cost seven or eight thousand dollars. I informed them, I think, that Mrs. Hughes (on whose behalf I was acting) could not possibly go beyond four thousand dollars, the amount she was to receive from the insurance company. I remember no more about it than that I had frequent conversations. I saw Mrs. Hughes frequently and she protested against or that she unwilling to go beyond that amount; that she was not willing to incumber the property. I acted more as a
73 friend for the parties than as counsel for either party. Both consulted me and seemed to have confidence in me.

2. In what manner did Mrs. Hughes desire to have the property improved, and in what manner did Mr. Wilson desire to have it improved, and from what cause were negotiations broken off?

Answer. As well as I remember the plan submitted by Mr. Wilson and his carpenter was to have two or three stories above the store so as to have a dwelling above the store for a family as before. I do not know what Mrs. Hughes submitted or had a plan, but the chief point with her was as to the price or sum charged. Mr. Wilson or Mr. Edmonston desired it so large. Mr. Edmonston was willing to build the house if he had a lien on it for the balance. Mrs. Hughes was willing to give the $4,000 and no more; that is what I understood. The negotiations were broken off there. During this conversation or negotiation, Mr.
74 Wilson said if the building was not put up on this plan he would have to get a dwelling outside, some where else. I remember the old house. It was an old house dilapidated. It had been cut out. The cash value of the old house was not more than four thousand dollars, if you were going to take it down and build another. As it stood, in connection with the lot, it was worth a good deal more than that. It was not worth three thousand dollars in exchange for a neighboring lot of same value. To rebuild another in its place would cost a good deal more.

3. What is the present annual value of the property as it stands?

Answer. It would bring now, and would for the last three years have brought, twenty-five hundred dollars per annum.

Cros:

1 x. Please state, as near as possible, the precise dates of your interviews with Mrs. Hughes and Mr. Wilson before referred to.

75 Answer. That I really cannot do. It was some time after the fire—after they began to clear away the rubbish, but I cannot give the dates.

2 x. Do you know of J. Carroll Brent having acted for Mrs. Hughes in any negotiation with Mr. Wilson?

Answer. Mrs. Hughes informed me that Mr. Brent was her counsel in the matter; received the insurance money, and so forth.

3 x. Can you state with certainty whether Mrs. Hughes ever proposed or was willing to give the full amount of the four thousand dollars insurance money towards the rebuilding?

Answer. In my repeated conversations with her I understood that to be her willingness.

4. What was the annual value of said premises before the war?

Answer. The annual rent then was much less then than now. The rent of the whole property was not worth more than fifteen or sixteen hundred dollars per annum.

EDW'D SIMMS.

76 *Hughes & Cheever to J. B. Wilson*, 16 *July*, 1857.

HUGHES & CHEEVER *to* JESSE B. WILSON. } Lease.—Recorded March 3, 1858.

This indenture, made this sixteenth day of July, in the year of our Lord eighteen hundred and fifty-seven, between Sarah T. Hughes and Annie J. Cheever, of the city of Washington, D. C., of the first part, and Jesse B. Wilson, of the same place, of the second part, witnesseth: That for and in consideration of the yearly rent hereinafter reserved and of the covenant and agreements hereinafter contained on the part of the said party of the second part, his executors, administrators, and assigns, to be performed and observed, respectively, the said parties hereto of the first part, have granted, demised, leased, and to farm let, and [and], by these presents, do grant, demise, lease, and to farm let, unto the said party hereto of the second part, his executors, administrators, and assigns, all that cer-
tain messuage, tenement, or dwelling-house, & store situate and
77 lying in the said city of Washington, on the [the] Pennsylvania avenue, between Sixth and Seventh streets, and now in the tenure and occupation of the said party hereto of the second part, together with all and singular the rights, privileges, hereditaments, and appurtenances to the same belonging or in any wise appertaining, to have and to hold the said premises, with the appurtenances hereby demised and leased unto the said party hereto of the second part, his executors, administrators, and assigns, from the first day of October, in the year of our Lord eighteen hundred and sixty, for and during the ful and complete term of five years then next ensuing, yielding and paying for the same yearly, and every year during the said term unto the said parties hereto of the first part, their heirs, or assigns, the yearly rent of one thousand and three hundred dollars, current money, in and by the following ever and equal portions and payments; that is to say, for the store aforesaid, the sum of two hundred and fifty dollars on the last day of each quarter succeeding the first day of October, 1860, and for the dwelling-house
aforesaid, the sum of twenty-five dollars on the last day of each
78 month succeeding the said first day of October; and the said party hereto of the second part, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree, to and with the said parties hereto of the first part, their heirs, and assigns, in manner following; that is to say, that he, the said party hereto of the second part, his executors, administrators, and assigns, shall and will, from time to time, and at all times during the continuance of the said term hereby granted, well and truly pay, or cause to be paid, to the said parties hereto

of the first part, their heirs, and assigns, the said yearly rent or sum of one thousand three hundred dollars, current money, upon the several days and times and the manner hereinbefore appointed or mentioned for payment thereof, and that neither he nor they shall assign, underlet, set over, or transfer the said premises without the consent of the said parties hereto of the first part, and that he will, at the expiration of the said term of five years hereby granted and demised, quietly and peaceably surrender and yield up the possession of the said premises unto the said parties hereto of the first part, their heirs, or assigns.

79 In testimony whereof, the said parties hereto have interchangeably set their hands and affixed their seals the day and year first aforesaid.

A. J. CHEEVER. [SEAL.]
G. T. HUGHES. [SEAL.]
J. B. WILSON. [SEAL.]

Signed, sealed, & delivered in presence of—
Witness to Mrs. Hughes' signature, J. C. BARRET.
" " " " Z. JONES.

JULY 27, 1857.

STATE OF INDIANA, *Marion County, ss :*

Personally appeared the above named A. J. Cheever before the undersigned, a notary public in & for said county and State, this 16th day of July, 1857, and acknowledged the execution of the annexed and foregoing instrument to be her free act and deed for the purpose therein expressed.

Witness my name and notarial seal at Indianapolis.

[SEAL.] ISAAC COFFIN, *N. P.*

I, Nathaniel C. Towle, register of deeds for the county of Washington and District of Columbia, hereby certify that the foregoing and annexed is a true copy of a lease from Hughes & Cheever to Jesse B. Wilson, and the whole thereof, as recorded in Liber J. A. S., No. 151, folios 51, 52, & 53, one of the land records for said county and district.

In witness whereof, I have hereto set my hand and affixed the seal of said office this 24 day of Oct., A. D. 1863.

N. C. TOWLE, *Register.*

80 *Lease of Hughes & Worcester to J. B. Wilson, Dec.* 30, 1858.

This indenture, made this thirtieth day of December, in the year of our Lord eighteen hundred and fifty-eight, between Sarah T. Hughes, of Washington City, in the District of Columbia, and Louis Worcester, and Annie J. Worcester, his wife, of the city of Louisville, of the first part; and Jesse B. Wilson, of the city of Washington, District of Columbia, of the second part.

Whereas heretofore, to wit, on or about the tenth day of September, in the year eighteen hundred and fifty-five, the said Sarah T. Hughes and the said Annie J. Worcester, then Annie J. Cheever, did, by their certain indenture of lease, grant and convey unto the said party of the second part the premises hereinafter described, from the first day of October, in the year 1855, for the full end and term of five years, which said lease is still unexpired; and whereas the said parties did afterwards, to wit, on the 16th day of July, 1857, grant and to farm

81 let the said premises to the said party of the second part for the further and additional term of five years from the end and expiration of the said first-mentioned estate; and whereas the said parties

of the first part have agreed to lease and to farm let the said premises unto the said party of the second part for the further and additional term of five years, and in order to avoid any question, and out of abundant caution, have agreed to execute and deliver unto the said party of the second part, a lease for the term and estate of ten years, to be computed from the first day of October, in the year eighteen hundred and sixty:

Now, therefore, this indenture witnesseth, that the said parties of the first part, hereby ratifying and confirming all and singular the acts, deeds, leases, covenants, and agreements aforesaid, and by way of addition to the same, and out of abundant caution as aforesaid, have granted, leased, demised, and to farm let, and by these presents
82 do grant lease demise, and to farm let, to and unto him, the said party of the second part, his executors, administrators, and assigns, all and singular that certain messuage, tenement, dwelling-house, and store situated on Pennsylvania avenue, between Sixth and Seventh streets, in the said city of Washington, now in the tenure and occupation of the said parties of the second part, together with all and singular the privileges, advantages, easements, and appurtenances, whatsoever to the said messuage or tenement and premises belonging or in any wise appertaining, or with the same or any part thereof now or heretofore usually or lawfully holden, used, occupied, or enjoyed.

To have and to hold the same with the appurtenances unto him, the said party of the second part, his executors, administrators, and assigns, from the first day of October, which will be in the year of our Lord eighteen hundred and sixty (1860), and immediately from and after
83 the end and expiration of the said first-mentioned lease, for and during the full end and term of ten years thence next ensuing fully to be complete and ended; yielding and paying therefore yearly, and every year during the said term, unto the said parties of the first part, the rent or sum of thirteen hundred dollars, current money, by equal quarterly payments, on the first day of October, first day of January, first day of April, and the first day of July in each and every year.

And the said party of the second part covenants, promises, and agrees to and with the said parties of the first part in manner and form following; that is to say, that he, the said party of the second part, the said rent or sum of thirteen hundred dollars ($1,300) hereinbefore reserved will well and truly pay, or cause to be paid, upon the several days and times, and in the amounts and proportions, hereinbefore appointed
84 and designated in payment of the same. Provided, however, and it is the true intent and meaning of these presents, that in the event of the total or partial destruction by fire of the premises aforesaid, the whole of the said rent, or such part and proportion thereof as may be abated and discounted in the event of such partial destruction or damage of the said premises by fire, having a view to the actual interference of such partial damage or destruction with the occupation and enjoyment of the said premises by the said party of the second part, shall cease to run and accrue until such time as the said premises shall be put and reinstated in full tenantable condition and repair by the said parties of the first part. And further, that he, the said party of the second part, will not assign, transfer, set over, or underlet the said premises during the said term and estate without the consent of the said parties of the first part first had and obtained thereto; and that
85 he will, at the end and expiration of the said term and estate, quietly and peaceably surrender and yield up the possession of the said premises to the said parties of the first part.

And the said parties of the first part do hereby covenant, promise, and agree, to and with the said party of the second part, that they will, at all times, and from time to time, during the continuance of the said term and estate, well and substantially repair and maintain and keep in repair, with good materials at their own proper cost and expense, all and every part of the messuage, tenement, dwelling-house, and store, and premises hereby demised.

In testimony whereof, the said parties have hereto interchangeably set their hands and affixed their seals the day and year first aforesaid.

S. T. HUGHES. [SEAL.]
ANNIE J. WORCESTER. [SEAL.]
LOUIS WORCESTER. [SEAL.]

Signed, sealed and delivered in presence of—
(The words "to the said party" having first been interlined in line 25, page 1.

W. W. McMAIN,
S. E. JONES,
F. J. MURPHY,
THOMAS C. DONN, } *As to Mrs. S. T. Hughes.*

86 STATE OF LOUISIANA, *Parish of East Baton Rouge, set:*

We, John R. Dufrocg and P. A. Walker, two justices of the peace in and for the parish aforesaid, in the State aforesaid, do hereby certify that Louis Worcester, a party to a certain deed bearing date on the 30th day of December, 1858, and hereto annexed, personally appeared before us in our said parish, the said Louis Worcester being personally well known to us as the person who executed the said deed, and acknowledged the same to be his act and deed; and at the same time personally appeared before us Annie J. Worcester, the wife of the said Louis Worcester, the said Annie J. Worcester being personally well known to us as the person who executed the said deed, and being by us examined privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said Annie J. Worcester, acknowledged the same to be her act and deed, and declared that she had
87 willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under our hands and seals this second day of February, 1859.

JOHN R. DUFROCG, *J. P.* [L. S.]
P. A. WALKER, *J. P.* [L. S.]

UNITED STATES OF AMERICA, *State of Louisiana:*

By Robert C. Wickliffe, governor of the State of Louisiana:

These are to certify that John R. Dufrocg & P. A. Walker, whose names are subscribed to the instrument of writing herein annexed, were, at the time of subscribing their names to said instrument, justices of the peace in and for the parish of East Baton Rouge, State aforesaid, and that their attestation to the same is made in due form of law and by the proper officer.

Given at Baton Rouge, under my hand and the seal of the State, this 2d day of February, one thousand eight hundred and fifty-
[SEAL.] nine, and of the independence of the United States the eighty-third.

ROBERT C. WICKLIFFE.

By the governor:

A. DUPLANTIER,
Ass't Secretary of State.

88 DISTRICT OF COLUMBIA, *County of Washington, sct:*

We, F. J. Murphy and Thomas C. Donn, justices of the peace in and for the county aforesaid, in the District of Col. aforesaid, do hereby certify that Sarah T. Hughes, a party to a certain deed bearing date the thirtieth day of December, 1858, and hereto annexed, personally appeared before us, in our said county, the said Sarah T. Hughes, being personally well known to us as the person who executed the said deed, and ackowledged the same to be her act and deed.

Given under our hands and seals this twenty-third day of February, 1859.

F. J. MURPHY, *J.P.* [SEAL.]
THOMAS C. DONN, *J. P.* [SEAL.]

89 DISTRICT OF COLUMBIA, *to wit:*

I, Return J. Meigs, clerk of the supreme court of the District of Columbia, certify that the foregoing 88 pages of paper writing are truly copied from the original testimony, and two exhibits, taken before William Redin, esq., late auditor of said court, and by him filed therein, in the equity cause No. 1398, equity rules No. 5, between Benjamin H. Cheever and Annie J. Worcester et al.

Witness my hand and the seal of said court this 27th day of November, 1869.

[SEAL.] R. J. MEIGS, *Clerk.*

90 Supreme Court of the Unitd States.

BENJ'N H. CHEEVER, APPELLANT,
vs.
JESSE B. WILSON & ANNIE J. WOSTER, APPELLEE. } No. 53.

And now comes the appellee, Jesse B. Wilson, by his counsel, and suggests to the court that there is error in the printed record; in this, that the depositions taken in this cause before the auditor, and which are referred to in the auditor's report at pages 40 & 41 of said printed record, are wholly omitted from said record, as will appear from an inspection of the same. Wherefore he prays for a certiorari to the court below, requiring them to send up to this court a complete tran-

91 script of the record and proceedings in this cause; and he states as a reason why said application has not been made earlier, that his said counsel only recently, & since the beginning of the present term, procured a copy of said record, and then, for the first time, was apprised of such omission.

WALTER S. COX,
Of Counsel for Appellee J. B. Wilson.

It is stipulated and agreed that the foregoing portions of the record within described may be returned and incorporated in the transcript, to the same effect as if returned on certiorari.

W. S. COX AND J. M. CARLISLE,
For Appellees.
C. CUSHING, *For Appellant.*

(Indorsement on record:) Dist. of Columbia sup. court. No. 53. Benjamin H. Cheever, appellant, vs. Jesse B. Wilson & Annie J. Worcester. Addition to record.

Filed 28th December, 1869.

Supreme Court of the United States.

DECEMBER TERM, 1869.

BENJAMIN H. CHEEVER, appellant,
vs.
JESSE B. WILSON, AND ANNIE J. WORCESTER, appellees.
No. 53.

BRIEF OF APPELLANT.

STATEMENT.

This is an appeal from the Supreme Court of the District of Columbia.

The appellant, Cheever, filed his bill June 28, 1858, in the circuit court of the District of Columbia, sitting as a court of equity, for the purpose of enforcing a decree of the circuit court of Madison county, Indiana, granting a divorce, *a vinculo matrimonii*, between him, the said Cheever, and Annie J. Cheever, now Worcester. The decree of divorce, in addition to the divorce, adjudged that a portion of the rents of certain real estate in the city of Washington, the separate property of the then Mrs. Cheever, should be paid to Cheever, for the support of two of the children of the marriage assigned to his care.

The bill in this case was to enforce performance of the decree in the matter of said rents.

Shortly after the rendition of the decree of divorce, Mrs. Cheever married one Louis Worcester, who has since died.

The defendant, Wilson, is in possession of the real estate, as tenant under a lease from Mrs. Cheever and her mother and trustee, Mrs. Hughes.

The court below dismissed the bill. (Transcript, p. 69.)

The learned judge, Mr. Justice Wylie, delivered a very able and learned opinion in pronouncing the judgment of the court on dismissing the bill.

In this opinion we are informed fully of the ground of objection taken to the Indiana decree. The court say:

"But in our view that decree is wholly void as to each of the subjects of which it claims to dispose: the divorce, the children, and the property." (Judge Wylie's printed opinion, p. 4.)

The only question then in the present appeal is, whether the decree in the Indiana divorce suit is null and void, or is it a valid decree?

The marriage between Cheever and his wife took place in Washington city, District of Columbia, September 8, 1842. Two days prior to the marriage, a marriage settlement was executed between Cheever and his intended wife.

The parties lived together in Washington city, D. C., from the time of marriage until December, 1854, and four children were born to them.

In December, 1854, the domestic relations of the parties became so unhappy that Cheever left his wife; taking some of the children with him, and leaving some with his wife.

At the time of separation, and until 1860, no law existed in the District of Columbia authorizing divorce *a vinculo matrimonii*, though the courts could grant divorce *a mensa et thoro*.

Some years after the abandonment by Cheever of his wife, she removed with one of her children to the State of Indiana, and on the 16th of June, 1857, she filed her petition in the district court of Marion county, of said State, praying a divorce *a vinculo matrimonii* from her husband, Cheever.

The petition is filed by "Annie J. Cheever," who describes herself as "a resident of Marion county, in the State of Indiana." The petition alleges the marriage and cohabitation until December, 1854. "At which time the defendant, without any cause whatever, deserted and abandoned the plaintiff, with the intention of a final separation from her, and has continued his abandonment from thence hitherto." (Tran-

script, p. 4.) The petition further charges, that since her abandonment her husband had made no provision for her, or her two younger children left with her. The petition further charges acts of cruelty. (*Ib.*, p. 4.)

Thereupon order of publication was made, on affidavit that defendant, Cheever, was a non-resident. (Transcript, p. 3.)

Afterwards, August 17, 1857, order was made changing venue to the Madison circuit court. (Transcript p. 3.)

Cheever appeared, and, in his answer, denied all the allegations of the petition, and required strict proof. (Transcript, p. 5.)

Cheever also filed a cross-petition, to which he made Mrs. Cheever, now Mrs. Worcester, a defendant. (Transcript, p. 5.)

In this cross-petition he states:

"That on or about the month of December, 1854, a disagreement arose between him and the said J. Cheever, that soon became and is wholly irreconcilable, without any reference whatever to a divorce from each other; that in consequence of the disposition of the said Annie it was impossible to live longer with her, and he was compelled to abandon her, which he did with intent never to live with her again; that it is impossible that any reconciliation can ever take place between them; that he tried long to live with said Annie, as her husband, but cannot do so without destroying the happiness of the remainder of his life." (Transcript, p. 8.) Cheever prays for a divorce. (p. 8.)

Mrs. Cheever, in her answer to the cross-petition, denied all its statements inconsistent with the allegations of her petition. (Transcript, p. 9.)

Mrs. Cheever filed her affidavit of *bona fide* residence in Indiana, August 24, 1857. (Transcript, p. 9.)

Here it is proper to note certain misapprehension of the facts of the case, made by his honor Judge Wylie.

Mr. Justice Wylie says: "On the 24th of August, just two days before the cause was submitted for the decision of the court, an order was made that both parties might withdraw their depositions." (Judge Wylie's Opinion, p. 12.)

The judge is mistaken as to the year in which this was done. The depositions were withdrawn in August, 1868, a year after the decree rendered in the cause. (Transcript, p. 12.)

The judge further says: "That at the time the decree was rendered there was no evidence before the court."

In this his honor is mistaken, because the depositions above referred to were then in court. Besides, any number of witnesses may have been examined orally in court, and the transcript would contain no reference to the fact, unless exceptions had been taken to evidence. Further the transcript (p. 10) states:

"The court having heard the evidence. * * * The court find the marriage, abandonment, and residence of the said Annie J. Cheever, the births, and names, and ages of the children, as stated in the original petition, to be true, and the residue of said petition to be untrue." (Transcript, p. 10.)

Court rendered decree of divorce. (Transcript, p. 10.) Thereupon, by consent, a further decree was made as to the custody of the children, and ordering Mrs. Cheever to transfer certain shares of Tehuantepec stock, and further ordered that Cheever should receive, as guardian of two of the children for their support, while they remain infants, one-third of the rents of the real estate in Washington city, D. C., the remaining two-thirds of the rents to go to Mrs. Cheever; the children on arriving at full age to receive their *pro rata* share of the said one-third of the rents, and upon the death of Mrs. Cheever all said real estate to vest in her children, issue of the marriage with Cheever, and Mrs. Cheever was to execute to Mr. Cheever a power of attorney to receive the rents as aforesaid. (Transcript, p. 11.)

Upon this state of facts we insist upon validity of Indiana decree.

POINTS.

1. *Res adjudicata.* A judgment or decree of a court of competent jurisdiction is conclusive wherever the same matter is brought in controversy, between the same parties or privies.

Miles *vs.* Caldwell, 2 Wall., 35.

Hopkins *vs.* Lee, 6 Wheaton, 109.
Parrish *vs.* Ferris, 2 Black, 606.
Walden *vs.* Bodley, 14 Peters, 146.
Thomas *vs.* Lawson, 21 Howard, 332.
Ableman *vs.* Booth, 21 Howard, 506.
Thompson *vs.* Roberts, 24 Howard, 233.
Aspden *vs.* Nixion, 4 Howard, 467.
Washington, Alexandria and Georgetown Steam Packet Co. *vs.* Sickles, 24 Howard, 333.
Warburton *vs.* Aiken, 1 McLean, 460.
Bissell *vs.* Briggs, 9 Massachusetts, 462.

2. By virtue of the constitutional provision authenticating the judgments of State courts.

The constitution ordains that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

"If the judgment is conclusive in the State where it was pronounced, it is equally conclusive everywhere," in the courts of the United States.

Christmas *vs.* Russell, 5 Wall., 302.
Story Constitution, sec. 1313, 3d ed.

A judgment of a State court has the same credit, validity, and effect, in every other court within the United States, which it had in the State where it was rendered.

Hampton *vs.* McConnell, 3 Wh., 234.
Benton *vs.* Bergot, 10 S. & R., 242.
Sarchet *vs.* The Davis, Crabbe, 185.
Bank of State of Alabama *vs.* Dalton, 9 How., 528.

It matters not that it was commenced by an attachment of property, if the defendant afterwards appeared and took defence.

Lafayette Insurance Co. *vs.* French, 18 How., 404.
Mayhew *vs.* Thatcher, 6 Wheat., 129.
Lincoln *vs.* Tower, 2 McLean, 473.

Nor that the service was illegal.

Houston *vs.* Dunn, 13 Tex., 480.

They have such effect as they possessed in the State where the judgment was rendered.

Green *vs.* Sarmiento, 3 Wash. C. C., 17.
Bank of State of Alabama *vs.* Dalton, 9 How., 528.

Where the jurisdiction has attached, the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits.

Bissell *vs.* Briggs, 9 Mass., 462.
United States Bank *vs.* Merchants' Bank, 7 Gill., 430.
Christmas *vs.* Russell, 5 Wall., 302.

When the judgment of a State is produced, which was rendered by a court of general jurisdiction, the presumption is in favor of the power and jurisdiction until the contrary appears.

Mills *vs.* Martin, 19 Johns., 33
Webster *vs.* Reid, 11 How., 460.
Nations *vs.* Johnson, 24 How., 208.

Judgments of another State are not *prima facie*, but conclusive evidence of debt.

Clay *vs.* Clay, 13 Tex., 204.

Whatever pleas may be good in State where judgment rendered, and none other, can be pleaded in any other court of the United States.

Mills *vs.* Duryee, 7 Cranch, 484.
Hampton *vs.* McConnell, 3 Wh., 234.

Thus, it would be competent to show that the judgment was obtained by fraud, or that the court rendering it had no jurisdiction.

Warren Manufacturing Company *vs.* Etna Insurance Company, 2 Paine, 502.
Steele *vs.* Smith, 7 W. and S., 447.
Drinkard *vs.* Ingram, 21 Tex., 352.

But fraud cannot be set up against a judgment by parties and privies.

Christmas *vs.* Russell, 5 Wall., 505–508.

When the judgment of a State court of general jurisdiction is produced, the presumption is in favor of the power and jurisdiction until the contrary appears.

Sprague *vs.* Letherberry, 4 McLean, 442.
Scott *vs.* Coleman, 5 Littel, 350.
Lathrop *vs.* Stewart, 5 McLean, 167.
Mills *vs.* Martin, 19 Johns., 33.
Harvey *vs.* Tyler, 2 Wallace, 328; 3 Wend., 267.
Pennington *vs.* Gibson, 16 How., 65.

The plaintiff suing on judgment of a State court need not prove the jurisdiction.

Reid *vs.* Boyd, 13 Texas, 242.

Personal service or appearance is essential to the jurisdiction.

Webster *vs.* Reid, 11 How., 460.
Nations *vs.* Johnson, 24 How., 208.

The courts of every country are the exclusive judges of their own jurisdiction, so far as it depends on their municipal law.

Rose *vs.* Himely, 4 Cr., 241.
Gregnon *vs.* Astor, 2 How., 319.

Before we can hold that the decree rendered in Indiana is a nullity, the clause of the constitution authenticating State judgments must be treated as of no effect.

In Indiana the decree is conclusive. Here, it is said, it is a nullity. If so, then the decree has an entirely different effect here from what it has in Indiana. But every decree rendered in a State court is entitled everywhere else to the same effect as in the State where it is rendered. But it is argued that this being a decree of divorce, a different rule must prevail. But we reply, there is no such exception in the constitution.

The common and statute law of the several States is adopted as a rule of decision in civil cases.

United States *vs.* Reid, 12 How., 361.

This court must, we submit, accept the action of the Indiana court as an authoritative exposition of the law of Indiana, and consider the decree of divorce as valid in Indiana. If valid in Indiana, the constitution makes it equally valid here.

It is clear, beyond controversy, from the authorities cited, that if Cheever had obtained a simple money decree against any party plaintiff, other than his wife, who had sued him in the courts of Indiana, such decree would be conclusive on such party in every court of the United States or of any State.

3. Effort is made, however, to except a decree in a divorce suit from the general principle of *res judicata* and the constitutional provision authenticating State judgments.

In endeavoring to make this exception, Judge Wylie takes the following grounds, which it becomes necessary to consider:

a. He urges that the wife has no power to change her domicil, for the purpose of entering a divorce suit against her husband.

But we submit that he is mistaken in this opinion.

Mr. Bishop says:

"Whenever the wife is plaintiff in a divorce suit, it is the burden of her allegation that she is entitled through the misconduct of her husband to a separate domicil. If she fails to prove this, she fails in her cause; if she does prove this, she establishes her cause." (2 Bishop on Mar. and Div., p. 126, sec. 125.)

"If the husband commit an offence which entitles her to have the marriage dissolved, she must establish a domicil of her own, separate from his, though it may or may not be in the same judicial locality with his." (*Ib.*)

"It is not apparent how it can be any more a uniform rule that the wife's domicil shall follow her husband, than that she shall not sue her husband. If she has adverse interests, and the law gives her the right to sue, it must give her by implication a domicil in which to bring the suit." (*Ib.*, p. 128, sec. 128.

"The doctrine that for the purposes of divorce the wife may have a domicil separate from her husband is well established in the American tribunals, although some of the authorities would seem to make the distinction (it is submitted, without proper foundation) that a wife cannot lose her domicil by the husband's change of residence after the offence is com-

mitted, yet cannot, on the other hand, acquire a new one. * * Though it is believed the preponderance of American authority, as well as weight of argument, is greatly the other way." (*Ib.*, p. 128, sec. 128.)

"There can be no doubt, in point of law, if a man chooses to remove from his State into another, being attracted to the latter State by a facility for obtaining a divorce, the change of domicil is just as effectual as if the motive were of a different kind." (*Ib.*, p. 122, sec. 122.)

See further on point of change of domicil to give jurisdiction to court—

Case *vs.* Clarke, 5 Mason, 70.
Shelton *vs.* Tiffin, 6 How., 163.
Cooper *vs.* Galbraith, 3 Wash. C. C., 546.
Story's Conflict of Laws, p. 285, note.

That wife may establish separate domicil from husband.

Dilson *vs.* Dilson, 4 R. I., 87.
Hamberry *vs.* Hamberry, 29 Ala., 719.

After a divorce *a mensa et thoro*, and the removal of the husband to another State, the domicil of the wife does not follow that of the husband.

Barber *vs.* Barber, 21 How., 583.

That wife may have separate domicil from husband for purpose of divorce.

Story's Confl. Laws, p. 285, note.
Jenness *vs.* Jenness, 24 Ia. R., 355.

b. Judge Wylie relies on Jackson *vs.* Jackson, (1 Johns. R., 424,) to show that the Indiana court had no jurisdiction of the case.

This brings up the question so much discussed in England, whether an English marriage can be dissolved by a Scotch court.

In Lolley's case, (1 Russ. and Ry. Ca., 236,) it was held, that an English marriage was indissoluble by the decree of a Scottish court.

But it is conceded by the learned judge, that the case of Lolley was greatly weakened by Warrender *vs.* Warrender, (9

Bligh, 89,) "and will not probably survive much longer, if it have not already been overthrown as an authority in the English courts." (Judge Wylie's Opinion, p. 10.)

In case of Warrender *vs.* Warrender, the House of Lords affirmed a divorce granted by Scottish court, where the parties were married in England. The husband was domiciled in Scotland before and after the marriage. The wife was an English woman. After marriage they lived a short time in Scotland, then returned to England. They separated in England, and wife went abroad; husband returned to Scotland.

Mr. Story says of this decision, that by it Lolley's case, which 'holds the indissolubility of an English marriage, was greatly shaken.

Story's Conflict Laws, sec., 226.

In the case of Warrender *vs.* Warrender, Lord Brougham, in delivering his opinion, argued strenuously in favor of the jurisdiction of Scotch courts to dissolve an English marriage, so that the parties would be free from marriage in England. (See note 1, p. 221, sec. 226, *c*, Story's Conflict Laws, p. 271.)

The doctrine of the indissolubility of English marriages by courts of another country, laid down with so much rigor in Lolley's case, can scarcely be considered as the law of England now, since the case of Warrender *vs.* Warrender, and the recent statute 23 and 24 Victoria, c. 144, sec. 7, giving jurisdiction to the courts to grant divorces.

Judge Story refers to the little regard paid in the judicature of the continental states to the decrees of foreign courts in matters which concern persons belonging to another sovereignty. Story's Conflict of Laws, sec. 208, (Redfield's edition.) He, therefore, very properly says that it is to the decisions of English and Scotch courts we must look for the most thorough discussion of this subject. (*Ib.*, sec. 215.)

In reference to the English courts, since the case of Warrender *vs.* Warrender, and the act of parliament granting jurisdiction to the courts in divorce cases, we may consider the English law as in a transition state and approximating nearer to the Scottish law.

In the Scottish courts the law has constantly been laid down differently from what it was in the English courts.

Permanent domicil or the *animus remanendi* is not necessary in Scotland to sustain the jurisdiction.

2 Bishop on Marriages, sec. 147, and cases cited in note.
Story's Conflict of Laws, sec. 217.
Ferguson on Marriages and Divorces, 68.
Dorsey *vs.* Dorsey, 7 Watts, 349; see reasons of Scottish courts for this doctrine.
Story's Conflict of Laws, sec. 222, 223, 224.

It is the universal usage of Scotch courts to decree divorces between parties present in Scotland, though domiciled in England, for any offence sufficient by the Scotch law, if the tribunal has a mere temporary jurisdiction over the parties and process is served on the defendant.

2 Bishop on Marriages and Divorces, 157, 148, 181.
1 Burge Col. and Fer. Laws, p. 670.
Duntze *vs.* Levett, Ferg., 68, 3 Eng. Ecc., 360.
Kebblewhete *vs.* Rowland, Ferg., 226, 232; 3 Eng. Ecc., 406.
Conway *vs.* Beazly, 3 Hay Ecc., 639; 3 Eng. Ecc., 242.

It remains now to examine the American law upon this point of jurisdiction.

Judge Story says: "The doctrine now firmly established in America is, that the law of the place of the actual *bona fide* domicil of the parties gives jurisdiction to decree a divorce.

Story's Conflict of Laws, p. 287, sec. 230.
See also Bishop on Marriage, note to sec. 142.

In confirmation of this view of Judge Story, we refer to certain cases in the State courts.

In Harding *vs.* Allen, (9 Greenl., 140,) the facts were as follows:

Parties married in Massachusetts, and afterwards were domiciled in Maine. There the husband deserted the wife, and took up his residence in North Carolina. The wife removed from Maine to Rhode Island, and there obtained a

divorce. The husband never was in Rhode Island, but citation served personally on him in North Carolina, which mode of service the court considered no better than publication. The divorce was held good in Maine, where the divorced wife sued for dower, the statute of Maine granting dower to a wife divorced for adultery, as if he were dead.

Harding *vs.* Allen, 9 Greenl., 140.

In this case the court say: "Most of the reasons which led to the adoption of the rule, that a marriage valid by the laws of the place where solemnized should be valid everywhere. The protection of innocent parties, and the purity of public morals, require that divorces lawfully pronounced in one jurisdiction * * should be recognized as operative and binding everywhere."

Harrison *vs.* Harrison, 19 Ala., 499.
Tolen *vs.* Tolen, 2 Blackf., 407.
Maguire *vs.* Maguire, 7 Dana, 181.
Wall *vs.* Williamson, 8 Ala., 48.
Wall *vs.* Williams, 11 Ala., 826.
Fellows *vs.* Fellows, 8 N. H., 160.
Pawling *vs.* Bird, 13 Johns., 192.
Mansfield *vs.* McIntyre, 10 Ohio, 27.
Cooper *vs.* Cooper, 7 Ohio, 238.
Gleason *vs.* Gleason, 4 Wis., 64.
Hubbell *vs.* Hubbell, 3 Wis., 662.
Dilson *vs.* Dilson, 4 R. I., 87.

4. As regards the argument from public policy against allowing such a decree as that to operate outside of the State in which it is rendered, we have to say, that this question should be determined by the law, and not by policy.

In regard, however, to public policy, it is to be noted that the law of the District of Columbia permits judicial divorces from the bond of matrimony.

Further, it would be a great hardship to Mrs. Worcester and the children born of her second marriage if the divorce decree should be held void.

5. This case is merely to enforce the money part of the decree of the Indiana court, and may be determined in favor of the appellant, without touching the question of the validity of the divorce part the decree.

It is familiar law that a wife may sue and be sued by her husband, (Story Equity, sec. 1368,) and the decree is binding upon them, as upon other litigants. Apart from the question of divorce, it is submitted that the money part of the decree in the Indiana court is conclusive in this case.

W. W. BOYCE,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

BENJAMIN H. CHEEVER,
Appellant.

vs.

JESSE B. WILSON
AND
ANNIE J. WORCESTER.

No. 53.

W. S. COX,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

BENJAMIN H. CHEEVER,
Appellant,
vs.
JESSE B. WILSON
AND
ANNIE J. WORCESTER.
No. 53.

Brief of Counsel for Appellees.

In August, 1857, the Circuit Court of Marion county, Indiana, passed a decree divorcing the appellant, a vinculo, from his wife, now Annie J. Worcester, and requiring her to execute an assignment of one-third of the rents of her real estate in the City of Washington, D. C., to the appellant, for the use and support of the minor children, during minority, and giving the rents immediately to the children, after they should become of age, and directing, that after her death, the real estate should vest in the children.

The defendant, Jesse B. Wilson, had previously obtained two leases for a ware-house on Pennsylvania avenue, Washington, the principal part of her property, one dated September 10, 1855, for five years, and one dated July 16, 1857, for a further term of five years, to commence from October 1, 1860, just after the expiration of the first lease. He had also a lease dated December 30, 1858, for 10 years from October, 1860, containing a stipulation, that if the the premises should be destroyed by fire during the term, the rent should cease until the premises should be rebuilt by the lessors. In fact, the premises were destroyed by fire in 1862 and never have been rebuilt by the lessors.

Wilson also acted as agent to collect her rents from a store on Sixth street, Washington.

This Bill was filed by the Appellant, to recover from Wilson one-third of the rents accruing under his leases.

Wilson had made large advances to Mrs. Cheever, (now Worcester,) in anticipation of the rents and on the pledge of them, which he claims to be allowed, in any event. He also denies, that the Appellant has any claim against him whatever, under the divorce decree.

The case was referred to an auditor, who made a report on the account between the parties, assuming the decree valid. His report was excepted to on both sides. The exceptions of defendants were sustained and those of complainant overruled, and the bill dismissed.

Points:

1. The decree of divorce was void for want of jurisdiction.

The courts of Indiana had no jurisdiction to decree the divorce of any but bona fide domiciled citizens of that State.

Bishop on Marriage and Divorce, sec. 721 and seq.; Story's Conflict of Laws, sec. 228–230; Chase vs. Chase, 6 Gray, 157; Jackson vs. Jackson, 1 Johns. Rep. 424; Dorsey vs. Dorsey, 7 Watts; Bradshaw vs. Heath, 13 Wend., 407–422; Hinds vs. Hinds, 1 Iowa R., 36.

The question of bona fide domicil is one of fact. It is clear, from the proof, that Mrs. Cheever went to Indiana for the sole purpose of procuring this divorce, with no intention to reside there longer than was necessary for that object. She went in February, the decree was obtained in August, and she remained until September. She was never there, as far as appears, before or after that period. See

her deposition in supplemental record, p. 19, and that of Jesse B. Wilson, p. 2. In June 1858, she married Worcester and went to Kentucky. The animus manendi, which is essential to make a bona fide domicil, was wanting.

Besides, during her coverture, she could not have acquired a domicil in Indiana. The former domicil of both parties was Washington. It is so shown in their marriage settlement. (p. 6 of Record.)

It is a general rule, that the husband's domicil is that of the wife, and she cannot acquire a different one during coverture. See cases above and Pennsylvania vs. Ravevel, 21 How., S. C., 110.

It will be found that the only exceptions are, that if the husband abandons her and acquires a different domicil, she may retain the domicil where she was abandoned and seek her remedies there, or she may go back to her friends in her original domicil and have redress there. See cases cited in Bishop on Marriage and Divorce, sec. 730. She cannot select a domicil any where, with reference to the laxity of its laws on this subject.

2. If there was jurisdiction of the person, there was none to affect the wife's property, even through the persons, under the laws of Indiana, which provide, that where a divorce is decreed for the act of the husband, the wife shall be restored to her property as if he had died. (See Rev. Statutes of Indiana of 18——, art. 48, ch. 4, sec. 18.) In this case, the husband's desertion was the ground of the decree.

3. Even if there was jurisdiction, the decree was unjust, and the courts of this District are not bound to carry it into execution. It does not establish a prior indebtedness or title. It merely undertakes, in the exercise of judicial discretion, to *create* rights of property anew. Our

courts are called on in this suit to enforce that decree. They are not bound to do so. 3 Daniel's Ch. Practice, 1869.

And if not bound, they ought not to do so. The decree is without a parallel. It divorces on the ground of the husband's desertion, and yet gives him a third of the wife's property, to support the children whom he was bound, at common law, to support, himself. It, in effect, awards him alimony for his own offence of desertion. By his own testimony, it appears that he has been supporting the three children with him, and, therefore, has been able to do it, at great expense. Besides, if the arrearages of rents are allowed him, as claimed, it takes away the wife's whole income for years to come, leaving her nothing for the support of herself and youngest child. The decree undertakes to give away the wife's property to the children when they become of age, which two of them have become since the decree, and further undertakes to dispose of the fee-simple after her death.

4. Supposing the decree valid and to be executed, what are the facts and figures? Jesse B. Wilson advanced to Mrs. Worcester the rents to accrue under his lease, and took an assignment of those and the rents of the Sixth street property to cover his advances. According to the auditor, he was repaid all his advances made before August 26, 1857, by the rents accrued and collected between that date and January 1, 1863. One-third of those rents, nett, would have been the sum of $2,437.41. Since January 1, 1863, the rents accrued from and collected by Wilson amount to $1,830. The whole of the rents, however, *i. e.*, Mrs. Worcester's original two-thirds, amounted to little more, say $1,866.

Cheever filed his bill in 1858, claiming *one-third* of the rents to fall due from Wilson, *as they shall fall due*, and not making parties of the other tenants.

The auditor allows him; 1, $622, the third of all the rents since January, 1863; 2, the third of the rents before that date, viz: $2,437.41; and charges both these against Wilson, as far as the sum in his hands, viz: $1,830, will go; although he has accounted for and paid to Mrs. Worcester two-thirds of that sum, viz: $1,220, before any such claim was set up.

5. The decree, if valid, is to be construed as only applying to Mrs. Worcester's two-thirds owned by her at the time of the divorce, and not, also, to her mother's one-third, since fallen in, by her death.

6. The decree is to be construed as giving Cheever only one-third of what Mrs. Worcester was actually entitled to. But as she had already been paid the rents in advance, and assigned them away for some years to come, the decree did not operate, even as against her, until Mr. Wilson was satisfied. There is no charge of fraud or concealment against her by the bill or any amendment. She swears that Cheever's counsel had notice of Wilson's claim before the decree. At all events, they had notice the day after, by the assignment executed by her, and could have had the decree reformed. The decree does not purport to establish *a personal debt* from Mrs. Worcester for any sum, ascertained or otherwise, but to *give a title to the specific rents*, more or less, just in proportion to her interest. It does not bind her to guaranty this title, or to make it good to any extent. But she had no title to the rents until January, 1863; they belonged to Wilson before that date. The decree, therefore, could not give one-third of them to Cheever, as against Wilson, nor as against her. Cheever is not, therefore, entitled to the $2,437.41 allowed him.

7. But if the decree is to be construed as giving Cheever one-third of the rents from August, 1857, to January, 1863, there results no more than a personal indebtedness for this amount on the part of Mrs. Worcester.

The decree, *thus construed*, purports to assign to Cheever *the property in one specific third* of the rents from August, 1857, to January, 1863, and again from that time on; that is, for each year and quarter as they fall due. It expressly reserves *the property in the remaining specific two-thirds to Mrs. Worcester*. Assuming, then, that she has intercepted and appropriated the rents belonging to Cheever before 1863, the only effect is, that *they are lost to him*, unless he can recover them by personal suit. He has his specific third since that date, but her interception of the rents before that date *does not, of itself, give him a title to her specific two-thirds* accruing since and expressly reserved to her. He must get a judgment against her, and proceed against it as against any other property. The decree cannot be tortured into meaning or operating to give him a *title* to any part of her two-thirds, in case of the failure of *his title to the specific third* awarded him, even through her act. And the *decree* does not purport to establish *a debt, still less to charge a debt on anything*.

The operation of the decree, then, as against Wilson, is to make him a *trustee for Cheever* since January, 1863, *as to one third*, and *for Mrs. Worcester, as to two-thirds*. For the two-thirds he was bound to account to Mrs. Worcester until Cheever obtained a judgment against her for money had and received and levied on her rents in his hands. The decree does not mean to give Cheever *a sum of money equivalent to one-third of the rents from date, payable out of and chargeable upon any rents* in Wilson's hands, *or any other property*. It means to give simply the *specific rents as they accrue* from year to year, and to give Cheever *a legal title through a proper assignment* so that he can collect them himself, but it does not direct such an assignment as would enable him *to collect any rents intercepted by her, out of her two-thirds*. The measure of the assignment decreed, is the measure of the title he acquired.

Suppose, for instance, Cheever, on presenting his assign-

ment to the tenant, finds his third for the first year paid over to Mrs. Worcester without notice. At the end of the second year he presents it again and claims not only his third for that year, but also his first year's third, to be paid out of Mrs. Worcester's two-thirds. Could the tenant pay it to him? Certainly not. His answer would be, "it may be true that Mrs. Worcester owes you the money, but the two-thirds in my hands are her property; your assignment covers only one-third of this year's rent as it has accrued, and you must get an order from her, or send the marshal with an attachment, before I can pay her money to any one else."

8. This is no case for the doctrine of substitution, because, first, that only applies as between creditors and not between a creditor and a purchaser. Cheever took a title *as purchaser*, and not *a lien, as creditor*. His *title* failing, he cannot be substituted, *in title*, to any thing else; still less to the *lien of a creditor*. Secondly, it only applies where a double incumbrancer absorbs the property which a subsequent single incumbrancer might have resorted to, *leaving other property* involved in the first or prior incumbrance, untouched. But Wilson, the double incumbrancer, took *all* he was entitled to. There is nothing left to which his lien attached, so that Cheever could be substituted to his lien against it. (See 1 Story's Equity, sec. 558, &c.)

9. It follows from the aforegoing that, even as against Mrs. Worcester, Cheever had no *lien* or *charge* upon Mrs. Worcester's two-thirds of the sum of $1,830 in Wilson's hands since January, 1863; but, as against Wilson himself, it is perfectly clear that he has not. *The bill never claimed* from him *more than one-third* of the rent as it should come due. Before the audit, no claim was made against him to charge the other two-thirds, as they accrued, with the arrears from '57 to '63, now claimed. He was, therefore, left to account for those two-thirds to Mrs. Worcester, and

has done so. No decree can be made against him, which would operate as a surprise. (See Story's Equity Pleadings, sec. 41, 42, &c.)

10. The utmost then, that could be recovered from Wilson, is the one-third in his hands, viz., $610. The other tenants would be liable for the one-third accruing from them. Wilson could not be liable for any part of their rent to Cheever, not even collected by him. Yet, Mr. Redin has charged him with $622, being one-third of all the rents, which is an error.

11. Again, a part of the money received by Wilson for Mrs. Worcester was collected by him, as her agent, from the Sixth street property. The decree, and even an assignment in pursuance of it, would not make Wilson the agent of Cheever, or establish any privity between them. The auditor was in error in charging Wilson with this in favor of Cheever.

Without examining, in detail, the exceptions taken to the auditor's report in the court below, the above points are submitted as the rules which should guide in the statement of the account, between the parties, if there be any cause of action.

W. S. COX,

Of Counsel for Appellees.

Feb 9 1870

Mr. Justice Clifford

Supreme Court of the United States.

DECEMBER TERM, 1869.

No. 53.

BENJAMIN H. CHEEVER, PLAINTIFF AND APPELLANT,

vs.

ANNIE J. WORCESTER AND JESSE B. WILSON,

APPELLEES.

Appeal from the Supreme Court of the District of Columbia.

Brief for Appellants.

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Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLANTS.

PARTIAL STATEMENT OF THE CASE.

The plaintiff, Benjamin H. Cheever, was married to the defendant, Annie J. Worcester, then Annie J. Hughes, September 8, 1842. They lived together until 1854. In June, 1857, the defendant, Annie, commenced proceedings for divorce in the circuit court of Madison county, Indiana. On the 19th of August, 1857, her husband appeared in court, filed his answer to her petition, and also a cross-petition praying that he should be divorced from her. On this an issue was joined, proofs taken, and a decree of divorce *a vinculo matrimonii* rendered in favor of the husband. The cross-petition also sets forth that the parties were the parents of four children; that the mother was an improper person to have them in charge, and exhibited a mar-

riage settlement made between them by which certain real property, situated in Washington city, was secured to her, through the intervention of a trustee, during her natural life, and after her death to the children of the parties; and prayed that the children might be placed in his custody and care, and also that a certain proportion of the rents and profits of the said property might be decreed to him as guardian of these children during their minority, to assist in their support, maintenance, and education. This prayer was granted by the court, and the one-third of the rents, issues, and profits, decreed to the husband for the purposes aforesaid.

This real estate was, at the rendition of the decree, in the possession of the defendant, Jesse B. Wilson, holding as the tenant of the wife, Annie. He, acting under her direction, refused to pay to the husband, the present complainant, any portion of those rents and profits; hence this action.

Mrs. Cheever, after her divorce from Mr. Cheever, was married to Louis Worcester, who has since died.

The supreme court of the district dismissed the bill. The plaintiff appeals.

As to the validity of the decree.

1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.

Const. U. S., Art. IV, Sec. 1.
Act of Cong. May 26, 1790, 1 Stat., 122.

The record, when duly authenticated, shall have in every other court of the United States the same faith and credit as it has in the State court from whence it was taken.

Mills *vs.* Duryee, 7 Cranch, 483.

Repeated decisions made since that time have affirmed the same rule, which is applicable in all similar cases where it ap-

pears that the court had jurisdiction of the cause, and that the defendant was duly served with process, or appeared and made defence.

Hampton *vs.* McConnel, 3 Wheat., 332.
D'Arcy *vs.* Ketchum, 11 How., 165.
Webster *vs.* Reid, Id., 460.
Nations *vs.* Johnson, 24 Id., 203.

If a judgment is conclusive in the State in which it is pronounced, it is equally conclusive everywhere in the courts of the United States.

Christmas *vs.* Russell, 5 Wall., 302.
Story on the Const., (3d ed.,) sec. 1313.

No objection, whatever, is made to the authentication of this record.

The defendant made his appearance to that suit, filed his answer to his wife's petition and also his cross petition, which she answered.

On these issues proofs were taken and the decree rendered.

2. The action for divorce is a *personal* action. The right to bring it goes with and attaches to the parties wherever they may be. It has no reference to the place of the original marriage, or the place where the offence for which the divorce is allowed was committed.

Story on Confl. of Laws, sec. 230, n.
2 Bishop on Mar. and Div., sec. 141, (4th ed.)

In this case the court had full and complete jurisdiction of the persons of both parties and of the subject matter of the suit.

3. This decree was rendered by a court of superior jurisdiction, and the presumption is all in its favor. The exhibition of a judgment or decree rendered by a court of superior jurisdiction is *prima facie* evidence of its jurisdiction of both subject-matter and the person. The party attacking a decree has the

burden of proof upon him, and it rests with him to show the want of jurisdiction.

Grignon's Lessee *vs.* Astor, 2 How., 341.
Exparte Watkins, 3 Pet., 205.
Pennington *vs.* Gibson, 16 How., 74.
Smith's Leading Cases, vol. 1, part II, p. 991, 6 Amer. Ed.
Wheeler *vs.* Raymond, 8 Cowen, 311.
Thomas *vs.* Robinson, 3 Wend., 269.

There is nothing whatever in this record which even tends to show that the matters and things charged in the petition and cross petition, and on the proof of which the court in Indiana rendered the decree, did not all happen in the State in which the decree was rendered, nor does it appear but what the parties had resided there always after their marriage. The first place of residence of either of the parties, *as shown by the record*, is as follows:

From November, 1856, to February, 1857, Mrs. Cheever lived with her mother in Washington city. *See int.* 19 *to her deposition, p.* 21, *addition to record.* Whether her sojourn was permanent or temporary is not shown. Where she lived previous to that time is not shown.

Mr. Cheever was living on G street, in Washington city (*see his deposition, p.* 15, *addition to record*) sometime between 7th of April, 1862, (the time of the fire,) *see cross-int.* 17, *p.* 7, *addition to record*, and the 12th of April, 1863, (the time of Mrs. Hughes' death.) *Cross-int.* 1, *p.* 18.

There is nothing in the record to show *that prior to those dates* these parties had not always resided in Indiana.

So that if the legal propositions sought to be maintained by the appellees should be sustained by the court, the facts do not warrant their application to the present case.

4. If the decree is conclusive in Indiana it is conclusive everywhere. It can be impeached or set aside in the District of Columbia for the same reasons and causes that it could be impeached in Indiana, and *for none other.* It can only be impeached

in Indiana for—1st, fraud; 2nd, want of jurisdiction. Fraud is not alleged and the question of jurisdiction is to be decided by *the law of Indiana.* The laws of Indiana have not been pleaded, nor offered, nor admitted in evidence. Being foreign laws they cannot be judicially noticed.

Thomas *vs.* Robinson, 3 Wend., 269.
Jackson *vs.* Jackson, 1 Johns., 431.
Hosford *vs.* Nichols, 1 Paige, 220.
Walker *vs.* Maxwell, 1 Mass., 103.
Holmes *vs.* Broughton, 10 Wend., 78.
Pearsall *vs.* Dwight, 2 Id., 34.
Legg *vs.* Legg, 8 Id., 99.

5. There is no issue made in the pleadings as to the validity of the decree of the court in Indiana. Mrs. Worcester does not question it. Wilson does not "admit its validity or regularity, but reserves the right to impeach it if occasion should require him so to do." This is all he says in regard to it, and it is submitted that this does not raise any issue.

6. Mrs. Worcester is in no position to attack this decree. She was a party to it, present and consenting. She has accepted its privileges by marrying her co-defendant Worcester, and she cannot now be heard to complain of any of its burdens.

2 Bish. on Mar. and Div., (4 Ed.) Sec. 751, 760.
Bourne *vs.* Simpson, 9 B. Monr., 454.
Gaines *vs.* Gaines, Id., 295.

Wilson is in no better position. He is but a stakeholder or bailee between the parties. It is a matter of no legal interest to him whether he pays this litigated one third of the rents of this property to Mr. Cheever or to Mrs. Worcester. It is purely a contest between the two latter in which Wilson has neither lot nor part.

FURTHER STATEMENT OF THE CASE.

Prior to the marriage of the plaintiff, with the defendant, Annie, and in anticipation of that marriage, all her real estate in the city of Washington was settled on trustees, she to receive the rents, issues, income, and profits thereof to her separate use during her life, and if she left children of that marriage living at her death, then in fee to such children, and in default of such children, to be disposed of by her last will.

During her coverture she executed to the defendant, Wilson, two leases at $1,300 a year; one in 1855, running to 1st October 1860; one in July 16, 1857, running to 1st October, 1865. She also borrowed $1,000 from the defendant, Wilson, and gave a deed of trust to these rents to secure the payment of that debt; and on the 11th February, 1857, gave to Wilson an authority in writing to retain out of said rents the sum of $2,000. The leases and the deeds of trust covered only the property on Pennsylvania avenue, but the assignment of 11th February covered also certain property on Sixth street.

The second lease was not received until after the parties, Cheever and wife, were divorced; nor was any notice given to any one of the paper of the 11th February, 1857.

A copy of that decree was received by the defendant, Wilson, on or before the 11th day of September, 1857; and another copy was exhibited, and the decree read to him, and a demand made of the rents by an agent of the complainant late in September or early in October, 1857.

No part of the rents assigned to complainant has ever been paid to him to this day.

On the day after the decree in Indiana the defendant, Worcester, executed an assignment pursuant to the decree, except that she interlined it, so as to make it subject to the sum of about $5,000 theretofore advanced to her by defendant, Wilson.

This bill was filed 21st June, 1858, and a copy of the divorce case was exhibited with it.

As to the effect of the decree.

1. The decree of divorce is the act of the court operating on parties, subject to its jurisdiction.

The disposition made as to the children and the property is by consent of parties, and not to be impeached.

Such disposition is conclusive as to the children, and as to all personalty embraced in it.

The decree operates *proprio vigore* everywhere, as well beyond as within the State in which it is granted, except as to the realty.

2. A decree by consent of parties is plenary proof of the agreement of parties; and it is wholly immaterial in equity whether the parties subsequently executed such papers as the decree required, because equity will consider that as done which ought to be done.

3. Notice of this decree to defendant, Wilson, operated as effectually as though the papers required by the decree to be executed had been executed, and copies served.

Lewin on Trusts, 605.
Hodgson *vs.* Hodgson; 2 Keene, 712.

If "he took upon himself to act as if the deed was invalid, he did it at his peril."

The notice to him related to his leasehold interest, which was personal property, and it was wholly immaterial to him to whom his rent was paid so long as the wife, his landlord, submitted to the status produced by the decree of divorce.

4. The decree operated on the rights of the parties to the leases, as they stood at the date of the decree. It is wholly immaterial whether Cheever had or not notice of the lien of Wilson on the rents, for that lien, whatever it was, was antecedent to the assignment to Cheever, and had precedence over the assignment, so far as Wilson's rights were involved.

5. By the terms of that decree, Cheever, "as the father and natural guardian of the children of the said Benjamin and Annie, that may be in his custody while they remain infants, may [read 'shall'] receive for *their several uses*, for their support, education, and maintenance, the one-third part of the rents and profits of the '*property*' *mentioned in the trust deed*, made part of the cross-petition, [here follows a description of the property,] the one-third part of the rents and property of said real estate that *would be coming* to the said Annie in her own right, be, and the same is hereby, decreed to the said Benjamin as the same *shall hereafter* become due and payable for the uses and purposes of said infant children as aforesaid during the life of said Annie."

* * * * * * * *

Here is an assignment in equity, perfected by notice to the tenant, by which not only one-third of the rents then receivable by said Annie was passed to complainant as guardian, but of all rents she should thereafter become entitled to in her own right.

So that on the falling in of the dower estate Cheever became entitled to one-third of the whole rents of the property.

As to the amount due.

1. It remains to be ascertained what at the time of the decree was the extent and amount of the lien of Wilson on the rents payable by him as agent of defendant, Worcester.

He must be put to strict proof, because his lien is against the interest of infants, the fruit of the marriage, for whom provision was made by the marriage settlement; and because it was a secret and private arrangement made between himself and defendant, Worcester, on the eve of her procuring her divorce.

He has failed to produce clear and satisfactory, or any proof, except his own statement in his answer, *which is not responsive to the bill, and therefore not evidence;* and his own and the testimony of Mrs. Worcester.

They are both subject to suspicion; she because of her evi-

dent moral interest to defeat the complainant; he by his direct interest in the result.

His books not only do not sustain, but are not to be reconciled with, his pretension as the amount of his claim. The pretended settlement between them on the 1st October, 1863, is either collusive or she was greatly imposed upon; and his books as well as his accounts and statements are irreconcileable with the evidence of Kennedy, whose main object was to ascertain the state of his account. He represented to Kennedy that his claim did not exceed $2,000, and now he makes it appear to be about $5,000.

Take the account filed with the deposition of Mrs. Worcester. It represents various payments as cash "*for rent*," and among others $433. The auditor has deducted this as an error. Take the same account filed with his answer, and the items charged as cash "*for rent*" are charged as *cash*, and none of them deducted, yet he settled that account with Mrs. Worcester with these charges for cash including the charge for $433, and she allowed them as cash. Take the same account, as copied from his books and annexed to the report of the auditor, and it differs from either of the others.

Again, in the foregoing account, which is brought down to *August* 26, 1857, appear his charges for cash, acceptances, and drafts, and among them a charge of $500 on the 28th July, 1857. Mrs. Worcester, when first interrogated as to this, says this sum was embraced in the note of that date for $2,412. She afterwards thinks she was mistaken.

Again, take the amount of the same account, $1,333, or $1,328, or $1,338—for all these sums are given—and add to it the notes enumerated in the auditor's report, "Account W.," $1,500, and it makes ---------- $2,838 25
Now deduct the rent, from October, '56, to July, '57 433 00

$2,405 25

Here then is the aggregate within a small fraction of the amount of that note, and there is not anywhere in his books

nor is there produced from any other source, except the evidence of these two defendants, a particle of proof to show that he paid to her before the 28th July, 1857, one dollar more than is thus credited to him. It is inconceivable that he should have advanced to her this further sum of $2,412 without his, or her, being able to show how, when or where any part of it was paid.

But this is not all. When, afterwards, he again began to advance to her, he time after time took from her notes in various amounts from $50 to $954 as appears by evidence of his clerk Williams, all of which appear to have been surrendered to her on the 1st day of October, 1863; but not a word is said of this note for $2,412.

And we assume the true state of the case to be that that note of $2,412 closed their transactions to the 28th July, 1857.

On the 1st August, 1857, she gave him another note for $1,000, on which it is admitted there was only advanced $58 before the 11th September, 1857.

The amount advanced to that day was only $2,470.

The largest advances claimed by the defendant Wilson is $2,412, July 28, 1857, and $1,000 August 1, 1857, only four days apart, for which notes were given by Mrs. Cheever, due in one year.

The only evidence given in support of these advances is the testimony of these two parties, and it is subject to suspicion. It is clear that these transactions took place while Wilson was in Washington city and Mrs. Cheever in Indianapolis. The remittances were not made direct from hand to hand. They must have been made through the intervention of the express company or some bank, by draft, check, or otherwise. How easy to introduce the evidence from the bank and make it certain. The failure to do this renders it almost certain that no such advances were made at that time. It is not claimed by either of them that they were so made. We charge that they were not made until after Wilson had notice of the decree of divorce, and then these notes were dated back to avoid the effect of the decree. If this be true these items cannot be allowed.

2. It will be confessed that the defendant Wilson is and has been during this controversy engaged in the grocery business. He undertakes to prove large advances of money (money lent) to Mrs. Worcester by his books of account. Of the account as allowed by the Auditor to be $5,407, but $27 dollars is charged as a grocery account; the balance is made up of the following items: $605 cash paid to Mrs. Worcester and upon orders given to others, such as Shuster & Co., Louis Worcester, &c.: $700 paid in sight drafts on New York; $4,912, with $942 to be deducted, of notes given by Mrs. Worcester. The only proof showing these payments are the grocer's books of account of Wilson. Wilson and Mrs. Worcester only swear to the correctness of these books. It is submitted that this is not the province of books of account; that books of account are admissible to prove charges made only in the ordinary course of business and they must be in the line of the party's general business—that a grocer cannot charge for money lent unless he was also a banker.

Vieths *vs.* Hagge, 8th Iowa.
Young *vs.* Jones, 8th Ib.
Dillon's Digest Iowa, p. 164.
Sloan *vs.* Ault, 8th Iowa.

We call attention to the fact that $242 are charged in one item for cash advanced as *per statement rendered;* that the $4,912 of notes are not accounted for by any testimony in this cause. Where are they? They have not been delivered up to Mrs. Worcester. The only notes given up in the presence of Williams, are those made *since* the rendition of the decree. There is no testimony or pretence that they have been delivered up to Mrs. Worcester.

3. The decree gave the complainant one-third ($\frac{1}{3}$) of whatever Mrs. Cheever should hereafter receive in her own right. Of this defendant Wilson had notice on the 11th September, 1857. He had a right to apply the whole income to the extinguishment of his advances, but by force of the notice of that decree

he became trustee for Cheever for his one-third from the date of the decree, and if he did as he had a right, apply Cheever's money toward the extinguishment of those advances, he was bound out of the same trust fund to repay to Cheever the money he had so employed as the rents accrued. It is not strictly a case of subrogation, yet it is within the principle. That is to say, Mrs. Cheever had diverted over a portion of the fund to the payment of her debt. This was done through Wilson the trustee, after notice. Equity will constrain him in like manner to apply her portion of the fund subsequently coming to his hand, with notice of Cheever's claim to the reimbursement of the money thus diverted.

4. Mrs. Cheever had no right or authority to anticipate the rent, and certainly not by leases to commence after the determination of a lease then in being.

4 Cruise, Real Prop. by Greenleaf, tit. 32, chap. 15, sec. 24, 5, 6, et. seq. top p. 213, marg. 165.
Sussex *vs.* Wroth, Cro. Eliz. 56 Rep., 33.
Slocum *vs.* Hawkins, Yelv. 222.
1 Brownl., 148.
Duke of Bucks, Sid. 101.

The result is that the auditor has erred;

1. In not allowing to Cheever one-third of the whole rents falling in on the death of Mrs. Hughes.

2. In allowing to Wilson the note for $2,412, and his account $1,333.

3. That he ought to have charged him with the whole amount received from the 6th street property.

Mr. Wilson had notice of Mr. Cheever's right to receive one-third of those rents. He could not in equity advance money to Mrs. Cheever, and take from her an order for those rents except

as subject to Cheever's right. The literal notice made him still a trustee.

It has not been deemed necessary to vindicate the ruling of the auditor as to Wilson's claim to abate the rent, or apply it to the rebuilding of the house destroyed by fire. Nor does this depend upon the question under which of the leases he was holding at the time of the fire. There was no covenant on the part of the lessor in either of them to rebuild. Under one of them he was bound to rebuild. Under the other he had an option to rebuild or to cease payment of rent. He chose the former, and the evidence shows it was a judicious investment.

The case of Kutter & Smith, 2 Wallace, S. C. R. 491–500, is thought to be conclusive of the question.

C. Cushing,
Thos. Wilson,
Attorneys for Plaintiff.

RECORD.

OF THE UNITED STATES.

[redacted]

[redacted] PLAINTIFFS IN ERROR,

[redacted]

[redacted]

[redacted] OF THE STATE OF PENNSYLVANIA.